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**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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No.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

*v.*

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.

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DOUGLAS M. COSTLE, ADMINISTRATOR,  
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

*v.*

CONSOLIDATION COAL COMPANY, ET AL.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT**

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The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency and the Environmental Protection Agency, petitions for a writ of certiorari to review judgments of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals in *National Crushed Stone Association v. EPA* (App. A, *infra*, 1a-37a), is reported at 601 F.2d 111. The opinion of the court of appeals in *Consolidation Coal Company v. Costle* (App. C, *infra*, 40a-78a) is reported at 604 F.2d 239.

## JURISDICTION

The judgment of the court of appeals in *National Crushed Stone Association v. EPA* (App. B, *infra*, 38a-39a), was entered on June 18, 1979. The judgment in *Consolidation Coal Company v. Costle* (App. D, *infra*, 79a-80a), was entered on June 25, 1979. On September 11, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 16, 1979, and on October 11, 1979, he further extended the time to and including November 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether regulations adopted by the Administrator of the Environmental Protection Agency establishing effluent limitations on discharges of pollutants, based upon the application of "best practicable control technology currently available" pursuant to Section 301(b)(1) of the Clean Water Act, 33 U.S.C. 1311 (b)(1), must include a variance provision that requires consideration of the economic ability of an individual discharger of pollutants to afford the costs of such technology.

2. Whether the validity of the Administrator's variance clause is subject to judicial review before its application to any discharger of pollutants.

## STATUTE INVOLVED

Pertinent portions of Sections 301 and 304(b) of the Clean Water Act, 33 U.S.C. (and Supp. I) 1311, 1314(b) are set forth in Appendix E, *infra*, 81a-85a.

## STATEMENT

In these cases, the court of appeals held that, in acting on applications by dischargers of pollutants into the nation's waters for individual variances from the pollution limitations established by the Administrator of the Environmental Protection Agency under 33 U.S.C. 1311(b)(1)(A), the Administrator must consider the applicant's claim that it cannot afford to implement the pollution control technology necessary to comply with the limitations. The court rejected the Administrator's contention that, under the statute, an individual discharger's economic inability to comply with those limitations is not a ground for granting a variance. The statutory and procedural background of these decisions is as follows:

1. Concluding that "the Federal water pollution control program \* \* \* [had] been inadequate in every vital aspect,"<sup>1</sup> Congress enacted the Federal Water

<sup>1</sup> S. Rep. No. 92-414, 92d Cong., 1st Sess. 7 (1971), reprinted in 2 *Legislative History of the Water Pollution Control Act Amendments of 1972*, Ser. No. 32-1, at page 1425 (Comm. Print 1973) (hereafter *Leg. Hist.*). See, also, *EPA v. State Water Resources Control Board*, 426 U.S. 200, 202-203 (1976).

Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 *et seq.*, which substantially rewrote the Federal Water Pollution Control Act, 33 U.S.C. (1970 ed.) 1151 *et seq.*<sup>2</sup> In this Act, now commonly referred to as the Clean Water Act, Congress declared as a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985," 33 U.S.C. 1251(a)(1). To achieve this goal, Section 301(a), 33 U.S.C. 1311(a), makes the discharge of any pollutant by any person unlawful, except where the discharge is in compliance with Section 301 itself and certain other enumerated sections of the Act, including Section 402, 33 U.S.C. 1342. In Section 301(b), 33 U.S.C. 1311(b), Congress directed the Administrator of EPA to establish maximum "effluent limitations" (*i.e.*, pollution limitations) on discharges from existing point sources.<sup>3</sup> In Section 402 of the Act, 33 U.S.C. 1342, Congress established the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the

<sup>2</sup> The Act was most recently amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and by the Act of November 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467. Until the 1977 Amendments, this legislation was generally known as the "Federal Water Pollution Control Act."

<sup>3</sup> Although Section 301(b) states, in the passive, that "there shall be achieved [effluent limitations]," this Court in *duPont v. Train*, 430 U.S. 112, 126-130 (1977), construed that section as authorizing and directing the Administrator to promulgate effluent limitations by regulation.

The terms "effluent limitation," "discharge of pollutants," "pollutant" and "point source" are defined in Section 502 of the Act, 33 U.S.C. 1362.

effluent limitations. It is unlawful for any person to discharge pollutants into the nation's waters without an NPDES permit, and the permits incorporate the effluent limitations promulgated under Section 301(b). Thus, an NPDES permit under Section 402 "serves to transform generally applicable effluent limitations \* \* \* into the obligations (including a timetable for compliance) of the individual discharger \* \* \*." *EPA v. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). See also *duPont v. Train*, 430 U.S. 112, 126 n.15 (1977).

Section 301(b) provides for the implementation of effluent limitations for existing point sources in two stages. First, Section 301(b)(1)(A) directs the Administrator to establish effluent limitations, to be met not later than July 1, 1977, "requir[ing] the application of the best practical control technology currently available" (hereinafter referred to as "BPT" limitations). Second, Section 301(b)(2) directs the Administrator to establish effluent limitations, to be met not later than July 1, 1987, requiring, depending on the type of pollutant, application of either the "best available technology economically achievable" or "best conventional pollutant control technology" (hereinafter, collectively referred to as "BAT" limitations). Section 301(b)(2)(A)-(E), 33 U.S.C. (Supp. I) 1311(b)(2)(A)-(E).<sup>4</sup>

<sup>4</sup> When this Court decided *duPont v. Train*, *supra*, the Act required BAT limitations to be achieved by 1983. The Court thus frequently referred to BAT limitations as the "1983 limitations." As amended in 1977, Section 301(b)(2) has deferred the best available technology deadline. For certain

The terms "best practicable," "best available," and "best conventional" technology are mainly defined in Section 304 of the Act, 33 U.S.C. 1314. Section 304 (b)(1)(B) provides that "[f]actors relating to the assessment of best practicable control technology \* \* \* shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved" as well as "the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate."

Section 304(b)(2)(B) adopts the same factors in defining best available technology as those employed in defining best practicable technology with one exception. Unlike the provision dealing with best practicable technology, Section 304(b)(2)(B) does not require the Administrator to consider the total cost of the best available technology in relation to expected effluent reduction benefits. Section 301(c), however,

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toxic pollutants, best available technology must now be achieved by July 1, 1984. Section 301(b)(2)(C). For other pollutants, the deadline is between July 1, 1984, and July 1, 1987, depending upon when EPA establishes the limitations. Section 301(b)(2)(F). In the Clean Water Act of 1977, Congress added a new technology level to replace best available technology for so-called "conventional" pollutants. This level, which must be met by July 1, 1984, is called "best conventional pollutant control technology." Section 301(b)(2)(E). For purposes of this case, the distinction between best available and best conventional technologies is not pertinent.

provides that the Administrator may modify the BAT limitations as applied to particular dischargers if the discharger demonstrates that the modification "(1) will represent the maximum use of technology within [his] economic capability \* \* \* and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."

In *duPont v. Train, supra*, 430 U.S. at 128, this Court upheld the authority of the Administrator to establish effluent limitations based on the best practicable technology—i.e., the 1977 limitations—so long as he permits some modification of those limitations with respect to individual plants through a variance clause. The Administrator has promulgated best practicable technology (or "BPT") limitations for 42 different industrial categories. See 40 C.F.R. Parts 405-460. With respect to each set of those limitations, the Administrator has promulgated a standard variance clause setting forth the grounds upon which the NPDES permit issuing authority (i.e., either EPA or state agencies with acceptable NPDES systems) may grant an individual discharger a modification of the effluent limitations.<sup>4a</sup> With respect to variances from the BPT limitations, the Administrator has concluded that the pertinent issuing agency may, under the statute, consider whether the individual discharger's cost of compliance with the limitations significantly exceeds the costs of other

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<sup>4a</sup> Under the statutory and regulatory system, state agencies with acceptable NPDES systems act in the first instance upon individual applications for variances, but EPA has the final authority with respect to the grant of such applications. See, e.g., 40 C.F.R. 432.22.



dischargers in the same industry. The variance clause, however, does not allow the permit issuing agency to consider, or grant, a variance based upon a claim that an individual discharger cannot afford best practicable technology.<sup>5</sup> As EPA has most recently stated (43 Fed. Reg. 50042 (1978) (emphasis in original)):

While EPA allows compliance costs to be considered under the BPT variance clause, it should be noted that EPA continues to believe that § 301(c) of the Clean Water Act (allowing waivers based upon plant-specific, economic cap-

<sup>5</sup> The standard best practicable technology variance clause, promulgated in these and other cases, provides (40 C.F.R. 434.22):

In establishing the [national best practicable technology] limitations \* \* \* EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the \* \* \* effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to [the permitting authority] that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. \* \* \* If such fundamentally different factors are found to exist, [the permitting authority] shall establish for the discharger effluent limitations \* \* \* either more or less stringent than the [national best practicable technology limitations] to the extent dictated by such fundamentally different factors.

ability or "affordability") applies only to best available technology (BAT) limitations.

Thus a plant may be able to secure a BPT variance by showing that the plant's own compliance costs with the national guideline limitation would be  $x$  times greater than the compliance costs of the plants EPA considered in setting the national BPT limitation. A plant may not, however, secure a BPT variance by alleging that the plant's own financial status is such that it cannot afford to comply with the national BPT limitation.

See also *In re Louisiana-Pacific Corp., etc.*, 10 E.R.C. 1841 (1977).

2. In April 1977, the Administrator adopted regulations establishing BPT limitations on discharges from existing point sources in certain subcategories of the coal mining industry, *i.e.*, coal preparation plants, acid mine drainage and alkaline mine drainage (42 Fed. Reg. 21380 *et seq.*, adopting 40 C.F.R. Part 434). In July 1977, the Administrator published regulations establishing BPT limitations on discharges from existing point sources in the crushed stone and construction sand and gravel subcategories of the mineral mining and processing category (42 Fed. Reg. 35843 *et seq.*, adopting 40 C.F.R. Part 436). Both regulations included EPA's standard variance provision for each subcategory.<sup>6</sup>

<sup>6</sup> 40 C.F.R. 434.22 (coal preparation plants); 40 C.F.R. 434.32 (acid mine drainage); 40 C.F.R. 434.42 (alkaline mine drainage); 40 C.F.R. 436.22 (crushed stone) and 40 C.F.R. 436.32 (construction sand and gravel).

Petitions to review both sets of regulations were filed in various courts of appeals under Section 509(b)(1)(E), 33 U.S.C. 1369(b)(1)(E), and all the petitions were ultimately transferred to the Fourth Circuit. The petitions challenged the regulations on various grounds, including the sufficiency of the variance clauses. The variance clauses were alleged to be inadequate, because they failed to provide for consideration of the economic ability of individual dischargers to afford the costs of best practicable technology.

In *National Crushed Stone Association v. EPA*, (App. A, *infra*, 1a-37a), the court of appeals vacated and remanded the substantive mineral mining regulations on various grounds (*id.* at 14a-29a), and we do not challenge that aspect of the court's decision. The court, however, also remanded the variance clauses promulgated in connection with those regulations on the ground that variance clauses pertaining to BPT limitations must include the same factors that Section 301(c) of the Act requires the agency to consider in acting on variance applications from the BAT limitations, which are to become effective no later than July 1, 1987 (*id.* at 29a-35a). Those Section 301(c) factors include a showing by the discharger that the requested variance "will represent the maximum use of technology within the economic capability of the [discharger] \* \* \*."

In remanding the variance clause, the court relied (*id.* at 29a-33a) on its earlier decision in *Appalachian Power Co. v. Train*, 545 F.2d 1351, as modified, 545 F.2d 1380 (1976). In that case the court had remanded a similar variance clause pertaining to the steam electric power industry (see 39 Fed. Reg. 36186 *et seq.* (1974)), on the ground that "EPA should come forward with a meaningful variance clause applicable to existing as well as new sources, taking into consideration at least [the] statutory factors set out in §§ 301(c), 304(b)(1)(B) and 306(b)(1)(B)." 545 F.2d at 1359-1360 (footnote omitted). The court concluded (545 F.2d at 1359):

Clearly, the Act, in its regulatory plan, contemplates increasingly stringent control measures for existing and new sources culminating in the elimination of the discharge of all pollutants into navigable waters by 1985. We are of opinion that the initial phase of these regulations, the 1977 standards and the subsequent new source limitations, were not intended to be applied any less flexibly than the final Phase II-1983 [now 1987] requirements. Thus, if such factors as the economic capacity of the owner or operator of a particular point source is relevant in determining whether a variance from the 1983 standards should be permitted, they should be equally relevant when applied to the less stringent 1977 standards as well as the new source requirements.

In *Consolidation Coal Company v. Costle*, the court of appeals affirmed the substantive coal mining regulations (App. C, *infra*, 40a-78a). As in *National Crushed Stone*, however, it remanded the variance clauses "for revision to conform with *National Crushed Stone*" (*id.* at 50a-52a).

#### REASONS FOR GRANTING THE PETITION

The decisions below, remanding EPA's standard variance clause pertaining to BPT limitations, is in conflict with the decision of the District of Columbia Circuit in *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (1978). Moreover the conflict involves an important issue that warrants this Court's review. Although the decisions below directly concern the variance clauses pertaining to effluent limitations for two industries, EPA has promulgated essentially the same variance clause in connection with all of its BPT limitations, applicable to 40 other industries. The decisions below thus create considerable doubt with respect to the validity and proper application of those clauses as well. Furthermore, whether EPA must allow variances to be granted on the basis of claims that individual dischargers cannot afford to comply with BPT limitations is a question that has significant implications for the achievement of Congress' objective of eliminating pollution from the nation's waters. We believe that the decisions below are incorrect, but in any event we submit that the

question is sufficiently important to merit this Court's review.

1. The decision below conflicts with *Weyerhaeuser Co. v. Costle*, *supra*. In that case, dischargers challenged EPA's standard variance clause as it pertained to BPT limitations established for the pulp and paper industry on the ground that it failed to permit consideration of individual dischargers' economic inability to comply with the limitations. The court rejected that contention. It noted that Section 301(c), which is the only statutory provision expressly dealing with variances, makes the economic capability of individual dischargers relevant only to applications for variances from the BAT limitations, which are the second phase of the statutory program. 590 F.2d at 1034-1035. The court also noted that Section 304(b)(1)(B), which sets forth the factors the Administrator must consider in establishing BPT limitations, requires the Administrator to consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved," but does not require the Administrator to consider the economic or financial ability of operators to meet those costs. 590 F.2d at 1035-1036. Finally, the court reviewed the legislative history of the Act and concluded that that history, as well as the language and structure of the statute, demonstrates that the economic hardships of individual operators are not proper grounds for excusing their compliance with



BPT limitations (*id.* at 1036-1037). Thus, the court stated (*id.* at 1036; emphasis in original):

We have explored this issue carefully, and we express our conclusion emphatically: Although the "total cost" of pollution control at the petitioning mill must be considered under a satisfactory variance provision, it is only relevant "in relation to the effluent reduction benefits to be achieved" at that mill, section 304(b)(1)(B); *so long as those costs relative to the pollution reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in fact the inability, of the operator to absorb the costs need not control the variance decision.*

We reach this conclusion under the statute only after satisfying ourselves that the legislative intent is as clear as the result is harsh \* \* \*.

The decisions below, and in *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1380 (4th Cir. 1976), on which they relied, are in direct conflict with that holding.<sup>7</sup>

<sup>7</sup> In *National Crushed Stone*, the court below expressed the incorrect view that "our construction of the variance provisions seems to be generally, if not precisely, in accord with that of the court in *Weyerhaeuser Co. v. Costle* [*supra*]" (App. A, *infra*, 34a). Although the court correctly noted that the court in *Weyerhaeuser* had held that "EPA's application of the 1977 [*i.e.*, BPT], variance clause must bear a similar relationship to the 1977 standards as the 1983 variance clause bears to the 1983 standards" (App. A, *infra*, 34a), it overlooked the critical holding of the District of Columbia

2. The issue is important. As we have noted, EPA has promulgated its standard variance clause in connection with BPT limitations for 42 industries. Under the decisions of the Fourth and District of Columbia Circuits, the agency's construction and application of that clause is invalid with respect to three industries, valid with respect to one, and in doubt with respect to 38 others. Such a result is unacceptable for the administration of an Act designed to establish nationally uniform requirements.

Furthermore, whether or not individual dischargers may obtain a variance from BPT limitations based on their own economic inability to comply is a question of substantial importance not only to those individual dischargers, whose economic survival may turn on the matter, but also to the achievement of Congress' purpose to eliminate water pollution. As the District of Columbia Circuit said in *Weyerhaeuser, supra*, 590 F.2d at 1036:

This issue is crucial, of course, because those mill operators who are most hard pressed economically will be the most likely to pursue vigorous variance demands. Moreover, when faced with the ultimate threat of economic hardship—plant closure, with attendant unemployment and regional economic dislocation—the local permit-granting agency will find it difficult to resist a plea for a variance.

Circuit that the BPT variance clause, in contrast to the BAT variance clause, need *not* require consideration of the individual discharger's economic inability to meet BPT limitations. The court below held to the contrary that it must.

The importance of the issue to the legislative objectives is also reflected in the remarks of Senator Nelson during the debates on the Act (2 Leg. Hist. 1355):

\* \* \* [T]he approach of giving variances to pollution controls based on economic grounds has long ago shown itself to be a risky course: All too often, the variances become a tool used by powerful political interests to obtain so many exemptions for pollution control standards and timetables on the flimsiest of pretenses that they become meaningless.

3. We submit that the decisions below are wrong for the reasons stated by the District of Columbia Circuit in *Weyerhaeuser, supra*. This, as the court correctly concluded, the language and structure of the Act support the Administrator's conclusion that, unlike variances from BAT limitations (which are expressly governed by Section 301(c)), BPT limitations and variances from them are not to be based on the economic inability of individual dischargers to apply the "best practicable control technology."

Furthermore, the District of Columbia Circuit correctly found that the legislative history demonstrates that Congress deliberately adopted "best practicable control technology" as a minimal level of effluent control that *all* sources within a category or class had to meet, even if the cost of compliance could drive certain individual sources out of business. For example: the conference committee report on the Act,

in a passage quoted in part in *duPont v. Train, supra*, 430 U.S. at 129, stated (1 Leg. Hist. 304):

The conferees intend that the Administrator \* \* \* will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable. \* \* \*

Similarly, Senator Muskie, "perhaps the Act's primary author,"<sup>8</sup> explained the "cost-benefit" language in Section 304(b)(1)(B) as follows (1 Leg. Hist. 170; emphasis supplied):

The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, *and to avoid imposing on the Administrator any requirement \* \* \* to determine the economic impact of controls on any individual plant in a single community.*

It is assumed, in any event, that "best practicable technology" will be the minimal level of control imposed on all sources within a category or class \* \* \*.

Representative Jones of Alabama, chairman of the House conferees, in presenting the conference bill to

<sup>8</sup> *duPont v. Train, supra*, 430 U.S. at 129.

the members of the House, also stated (1 Leg. Hist. 231, 232; emphasis supplied) :

If the owner or operator of a given point source determines that he would rather go out of business than meet the 1977 requirements, the managers clearly expect that any discharge [permit] issued in the interim would reflect the fact that *all discharges not in compliance with such "best practicable control technology currently available" would cease by June 30, 1977.*

\* \* \*

\* \* \* [S]ection 301(c) authorizes a case-by-case evaluation of any modification to the July 1, 1983, requirement proposed by the owner or operator.

\* \* \*

*This provision is not intended to justify modifications which would not represent an up-grading over the July 1, 1977, requirements of "best practicable control technology."*

See also remarks of Senator Nelson, quoted *supra*, page 16 (2 Leg. Hist. 1355).

Neither the decisions below nor *Appalachian Power Company, supra*, on which they relied, discussed the legislative history of the Act. Instead, they were based on the court's view that it would be illogical for an agency not to consider a factor (economic inability) in acting on an application for a variance from BPT limitations when it will consider the same factor in acting upon variances from the more stringent BAT standards (see App. A, *infra*, 34a; *Appalachian Power Co., supra*, 545 F.2d at 1359). Even as a matter of abstract logic, however, there is

no inconsistency in concluding that a more stringent standard should be accompanied by a more liberal variance provision in order to prevent the greater economic dislocations that might otherwise result. Furthermore, the court's logic overlooks the fact that under the statutory scheme, BPT levels are intended as a minimum requirement that no discharger will be permitted to violate, even after 1987, regardless of his economic situation.<sup>9</sup> In any case, the matter ought not be judged abstractly. As this Court stated in *duPont v. Train, supra*, 430 U.S. at 138, in rejecting the Fourth Circuit's application of similar logic to a closely analogous issue under the Clean Water Act: "The question, however, is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for *these* regulations."<sup>10</sup>

<sup>9</sup> Thus, Section 301(c), which deals expressly with variances from BAT limitations requires a discharger applying for a variance to demonstrate not only that the requested modifications will reflect the "maximum use of technology within [his] economic capability" but also "will result in reasonable further progress toward the elimination of the discharge of pollutants." If an applicant for a variance from BAT limitations were to seek a modification that would allow greater discharges than even the BPT limitations would have allowed, his proposed modification would not "result in reasonable further progress toward the elimination of the discharge of pollutants."

<sup>10</sup> In *duPont v. Train*, the Fourth Circuit held that the Administrator should promulgate a variance clause with respect to the most stringent "new source" limitations established under Section 306 of the Act, 33 U.S.C. 1316, on the ground that "provisions for variances, modifications, and

4. This case also presents a substantial ripeness question. In *duPont v. Train, supra*, this Court upheld the Administrator's authority to promulgate BPT limitations by regulation "so long as some allowance is made for variations in individual plants." 430 U.S. at 128. The Court, however, agreed with the court of appeals in that case that "consideration of whether EPA's variance provision has the proper scope would be premature" (*id.* at 128 n.19), in view of the fact that that case did not involve the application of the variance clause to any particular discharger.

Similarly, the variance clauses reviewed and remanded by the court of appeals in these cases have not yet been applied to any applicant for a variance. For that reason we argued in the court of appeals that such pre-enforcement review of the validity of those clauses would be inappropriate under the principles announced in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and other cases. The court disagreed. It concluded that the Administrator had made clear, in a number of statements and decisions since *duPont v. Train*, that economic inability would not be a ground for granting variances, and that those statements made the issue sufficiently ripe for review (App. A, *infra*, 30a-32a). In *Weyerhaeuser, supra*, the District of Columbia Circuit also reviewed

exceptions are appropriate to the regulatory process." *duPont v. Train*, 541 F.2d 1018, 1028 (4th Cir. 1976). This Court rejected that view on the ground that it was contrary to the statute. 430 U.S. at 138.

EPA's standard variance clause and upheld the Administrator's position.<sup>11</sup>

We continue to believe that it was inappropriate for the court to review the variance clause prior to its application to any individual discharger. We acknowledge, however, that the question is a close one, because the Administrator's position on the variance clause has now become clear and presents a discrete legal issue that is capable of pre-enforcement review. See *Abbott Laboratories v. Gardner, supra*, 387 U.S. at 149-153. Moreover, there is a direct conflict between the decision below and the District of Columbia Circuit on that issue that needs to be resolved.

Standing alone, the ripeness question might not warrant this Court's review. The difficulty faced by the agency, however, is that if the Court denies review of the decisions below, the agency is required by the court of appeals' judgment to amend its variance clauses pertaining to these two industries to conform to the court's decision. The agency would thus never have an opportunity to present its position for this Court's review in any subsequent proceeding involving actions on variances in these industries; and in view of the conflict among the circuits, it would have

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<sup>11</sup> In *Weyerhaeuser*, the court purported not to undertake "final review of the variance provision," but rather to engage in a "threshold review" to determine whether the provision was sufficiently flexible to satisfy this Court's statement in *duPont* that "some allowance" must be made for variations in individual plants. 590 F.2d at 1032. Whatever label the court applied, it did in fact review the variance clause and upheld the Administrator's position as a matter of law.



to continue to apply different standards to different industries.

Accordingly, if this Court agrees with us that the issue is not ripe for review, we believe it should grant the petition and vacate the judgments below on that ground, so that the issue may be preserved for later cases in which it is ripe for review. If the court disagrees with us on the ripeness question, it should grant the petition and review the question we have presented on the merits.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1979

### APPENDIX A

#### UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 76-1914

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NATIONAL CRUSHED STONE ASSOCIATION, INC.  
and LUCK QUARRIES, INC., PETITIONERS

*v.*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 76-1929

---

WARREN BROTHERS COMPANY, a Division of  
Ashland Oil Co., Inc., and Ashland Oil, Inc.,  
PETITIONERS

*v.*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

---

No. 76-1930

---

ARKHOLA SAND AND GRAVEL COMPANY, a Wholly  
Owned Subsidiary of Ashland Oil, Inc.,  
PETITIONER

*v.*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

---

ON PETITION FOR REVIEW OF AN ORDER OF THE  
ENVIRONMENTAL PROTECTION AGENCY

---

Argued April 4, 1978

Decided June 18, 1979

Before HAYNSWORTH, Chief Judge, RUSSELL and  
WIDENER, Circuit Judges

WIDENER, Circuit Judge:

Petitioners, National Crushed Stone Association (NCSA), Warren Brothers Company (Warren Brothers), and Arkhola Sand and Gravel Company (Arkhola) seek review of certain regulations promulgated by the Environmental Protection Agency (EPA) pursuant to §§ 301, 304 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1311, 1314. These regulations establish limitations on the discharge of pollutants<sup>1</sup> from existing point sources<sup>2</sup> of the crushed stone and construction sand and gravel subcategories of the mineral mining and processing point source category, based upon the best practicable

<sup>1</sup> "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." FWPCA § 502(6); 33 U.S.C. § 1362(6).

<sup>2</sup> "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." FWPCA, § 502(14); 33 U.S.C. § 1362(14).

control technology currently available (BPT).<sup>3</sup> The regulations challenged here were promulgated in final form on July 12, 1977, to be effective August 11, 1977, 42 F.R. 35843 et seq. Previous to the promulgation of the final regulations, the EPA had issued regulations in "interim final" form,<sup>4</sup> June 10, 1976, 41 F.R. 23552 et seq. This court has jurisdiction under § 509 (b) (1) of the FWPCA, 33 U.S.C. 1369(b) (1).

The crushed stone subcategory regulations, 42 F.R. 35849-50, to be codified as a part of 40 C.F.R. Part 436, subpart B, apply "to the mining or quarrying and the processing of crushed and broken stone and riprap. This subpart includes all types of rock and stone." 42 F.R. 35849. Riprap consists of large, irregular stones used chiefly in highway embankments and in river and harbor work. Other types of crushed stone are used, for example in concrete, macadam, and bituminous aggregate, in railroad ballast, in agriculture, and in road bases. Approximately three quarters of all crushed stone is limestone. The crushed-stone industry is widespread, with all States reporting some production. The size of individual

<sup>3</sup> FWPCA, §§ 301(b) (1) (A) (i), 304(b) (1) (A); 33 U.S.C. § 1311(b) (1) (A) (i), 1314(b) (1) (A).

<sup>4</sup> The EPA failed to meet the deadline established by the FWPCA, § 304(b); 33 U.S.C. § 1314(b), for establishing guideline regulations. The interim regulations were promulgated by EPA in response to a court order which required the EPA to issue the regulations according to a timetable. 41 F.R. 23552, citing *Natural Resources Defense Council v. Train*, 6 ERC 1033 (D.D.C. 1973), affirmed in part, reversed in part, 510 F.2d 692 (D.C. Cir. 1975).

facilities varies widely, from less than 25,000 to 15 million tons per year. Facilities which produce less than 25,000 tons per years constitute one-third of the total number of facilities, but only 1.3% of total national output. At the other extreme, 5.2% of the facilities each produce more than 900,000 tons annually, but together these make up 39.5% of the total output. Nationwide there are approximately 4800 crushed stone facilities.

The construction sand and gravel subcategory regulations, 42 F.R. 35850-51, to be codified as 40 C.F.R., Part 436, subpart C, apply "to the mining and the processing of sand and gravel for construction or fill uses." 42 F.R. 35850, § 436.30. Construction sand and gravel is used in building, paving, fill and railroad ballast applications. As with crushed stone, sand and gravel facilities are found in all States. Of the more than 5,000 firms engaged in production, 40% have an annual capacity of less than 25,000 tons; these smaller firms account for 4% of the national output. Larger firms with an annual capacity of more than one million tons, on the other hand, account for 12-15% of the national output, although by number they constitute less than 1% of the producing facilities.

Crushed stone and construction sand and gravel operations produce two basic types of waste water which must be discharged and which the EPA has regulated. The first with which the Agency is concerned is that from "mine dewatering." For crushed stone operations the term means "any water that is impounded or that collects in the mine and is pumped,

drained or otherwise removed from the mine through the efforts of the mine operator." 42 F.R. 35849, § 426.21(b). The definition for the construction sand and gravel industry includes identical language. 42 F.R. 35850, § 436.31(b). The introduction of pollutants includes those coming from "surface runoff of rain water into the mine and mine water treatment systems, ground water seepage and infiltration into the mine." 42 F.R. 35845. The quantity of mine water that must be discharged either has no correlation with production or is only indirectly related. Only 13% of crushed stone facilities have no mine water. Mine water is also present in construction sand and gravel operations.

The other type of waste water commonly associated with crushed stone and construction sand and gravel operations is that used in the processing of the applicable products. In the crushed stone industry, after the stone has been extracted from the quarry and crushed and screened to meet size specifications, water is added to wash the stone. In a few operations the rough product is processed in a flotation cell, where impurities are removed in the overflow from the cell, and the product is removed in the underflow. Some facilities also have a dry production process. With the dry process, of course, there is no discharge of process generated waste water, although half of the dry process quarries must be dewatered on at least an intermittent basis. Overall in the crushed stone industry 59% of the 4800 facilities wash their product. Of the crushed stone wet processing facilities con-

tacted by the EPA, 33% do not discharge their wash water.

Construction sand and gravel facilities also use water in processing the product to remove impurities such as clay and silt in separating and classifying the product, and in cooling and dust suppression. Half (35) of the facilities visited by the EPA have no discharge of process water because they recirculate all process water. A few facilities achieved no discharge of process water because of soil percolation or because of dredging closed ponds, the process water being discharged back into the pond. Some sand and gravel facilities use a dry process, and thus have no discharge of process water. 4250 industry plants have wet process operations; only about 750 have dry operations. A few sand and gravel operations use dredging techniques.<sup>3</sup>

In developing the regulations the EPA considered the varieties, prevalence, and environmental effects of effluent produced by crushed stone and construction sand and gravel operations, and also the current pollution control practices used in the industries. Only two measures of pollution were considered by the Agency to be of sufficient importance to warrant regulation: Total suspended solids (TSS) and pH.<sup>4</sup> TSS

<sup>3</sup> The production of dredged sand and gravel which is processed on-board the dredging vessel is not covered by the regulations under review. 42 F.R. 35850, § 436.30.

<sup>4</sup> pH is a symbol expressing the acidity or alkalinity of a substance. A pH of 7 is neutral, with lower figures representing increasing acidity and higher figures representing increasing alkalinity.

measures both organic and inorganic materials, such as sand, silt, clay, grease, oil, and tar. Solids in suspension interfere with many industrial processes; they are aesthetically displeasing; they burden aquatic life by depleting the oxygen content of water and clogging the respiratory passages of various fauna. The Agency considers TSS to be the single most important pollutant parameter in the mineral mining and processing industry. The petitioners do not challenge the EPA's regulation of pollution as measured by pH.<sup>7</sup>

The interim regulations published by the EPA on June 10, 1976, 41 F.R. 23552, divided waste water discharges from crushed stone and construction sand and gravel facilities into two components. "Mine dewatering," referred to earlier, was there defined for both subcategories as "any water that is pumped, drained or otherwise removed from the mine through the direct action of the mine operator." 41 F.R. 23558, § 436.21(b); 42 F.R. 23559, § 436.31(b). The definition for construction sand and gravel added "wet pit overflows," not relevant here. Mine water was permitted to be discharged if TSS concentration did not exceed 30 milligrams per liter (mg/l) of waste water output for any one day. 51 F.R. 23558, § 436.22(a)(2), 41 F.R. 23559, § 436.32(a)(2). The technical material accompanying the crushed stone regulations, 41 F.R. 23554, explained in general that

<sup>7</sup> In their opening brief, petitioners note that "only the provisions relating to the TSS requirements are relevant here."



"mine dewatering for all subcategories is limited on a daily maximum basis only, since mine dewatering may occur on an intermittent basis." Water which collects on quarry floors "is quite clear" and "is typically of excellent purity," 41 F.R. 23554. Thus, it often may be discharged without treatment, but "in extreme cases [where treatment is necessary] a settling pond at ground level" will permit enough of the suspended solids to settle out so that the mine water will meet the 30 mg/l criterion. 41 F.R. 23555.

The other waste water discharge regulated by the Agency in the interim regulations was "process generated waste water," defined for crushed stone operations as "any waste water resulting from the slurry transport of ore or intermediate product, air emissions control, or processing exclusive of mining." 41 F.R. 23558, § 436.21(e). No discharge of process generated waste water pollutants was permitted by the interim regulations, *Id.* at § 436.22(a)(1), although the regulations contained exceptions.<sup>8</sup> Crushed stone facilities would be able to meet the no discharge requirement by clarifying process generated waste water in a settling pond, and then recirculating it in the production cycle. 41 F.R. 23554. As envisioned by EPA in the interim regulations, all water used in the production processes would be recycled back

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<sup>8</sup> The regulations did permit discharge of process water when an overflow occurred as a result of a "maximum 24 hour precipitation event with a probable reoccurrence interval of once in 10 years." 41 F.R. 23558, §§ 436.21(c), 436.22(b).

to the process for reuse, and thus there would be no discharge.

The regulatory scheme established by the interim regulations for construction sand and gravel plants was not identical, but similar. There, too, discharge of process generated waste waters was prohibited. 41 F.R. 23559, § 436.32(a)(1). However, because the EPA found that in construction sand and gravel plants "mine water is often treated in process waste water ponds," 41 F.R. 23555, the interim regulations for construction sand and gravel operations provided that when "waste streams from various sources are combined for treatment and discharge, the quantity and quality of each pollutant or pollutant property in the combined discharge shall not exceed the quantity and quality of each pollutant or pollutant property allowed had each stream been treated separately." 41 F.R. 23559, § 436.32(a)(3). Thus the regulations provided that the water to be discharged from the two sources could be commingled in the same settling pond and discharged subject to the 30 mg/l limit. The regulations did not require or mention recycling, and obviously rejected the Technical Summary, which in 41 F.R. 23555 had recommended recycling where there was a commingling in a settling pond.

On July 12, 1977, a little more than a year after the interim regulations were published, the EPA announced its final rulemaking for the crushed stone and construction sand and gravel subcategories, 42 F.R. 35843. Two principal changes which concern us were made in the final regulations. First, the maximum TSS mine water effluent limitation for both

subcategories was raised from a permissible discharge of 30 mg/l for any one day to 45 mg/l, but a new thirty day average of 25 mg/l was promulgated. 42 F.R. 35850, § 436.22(a)(1); 42 F.R. 35851, § 436.32(a)(1). Second, the no process water discharge provision of the interim regulations was changed for some facilities. Instead of the former provision, crushed stone and construction sand and gravel operations "that recycle waste water for use in processing" were permitted to discharge "process generated waste water pollutants" in accordance with a daily maximum of 45 mg/l and 30 day average of 25 mg/l. 42 F.R. 35850, § 436.22(a)(1), 42 F.R. 35851, § 436.32(a)(1). The interim no discharge provision was retained unchanged for facilities which did not recycle. 42 F.R. 35850, § 436.22(a)(2); 42 F.R. 35851, § 436.32(a)(2). In addition to these changes, the definition of mine water for both subcategories was changed by classifying all water collected or impounded in a mine as "process generated waste water" if the mine is used for treatment of "process generated waste water,"<sup>9</sup> and the definition of process

<sup>9</sup> The final definition of mine water for the crushed stone subcategory reads as follows:

(b) The term "mine dewatering" shall mean any water that is impounded or that collects in the mine and is pumped, drained or otherwise removed from the mine through the efforts of the mine operator. However, if a mine is also used for treatment of process generated waste water, discharges of commingled water from the facilities shall be deemed discharges of process generated waste water.

42 F.R. 35849, § 436.21(b). With the addition of one sentence, "This term shall also include wet pit overflows caused

generated waste water was amended to "include any other water which becomes commingled with such waste water in a pit, pond, lagoon, mine, or other facility used for treatment of such waste water."<sup>10</sup>

In the Summary of Major Changes that accompanied the new regulations, the EPA explained the rationale for the changes described above. The increase in the daily maximum TSS discharge and the addition of a maximum average 30 day discharge "were made because additional data collected since the promulgation of the interim final regulations indicated that the day-to-day variations in discharges from individual operations were greater than initially found, and because the additional information collected provided the broader data base necessary for

solely by direct rainfall and ground water seepage," the definition of mine water for construction sand and gravel is identical. 42 F.R. 35850, § 436.31(b).

<sup>10</sup> The final definition of process generated waste water for the crushed stone subcategory reads as follows:

(e) The term "process generated waste water" shall mean any waste water used in the slurry transport of mined material, air emissions control, or processing exclusive of mining. The term shall also include any other water which becomes commingled with such waste water in a pit, pond, lagoon, mine, or other facility used for treatment of such waste water.

42 F.R. 35849, § 436.21(e). With the addition of one sentence, "The term does not include waste water used for the suction dredging of deposits in a body of water and returned directly to the body of waste without being used for other purposes or combined with other waste water," the definition of process generated waste water for construction sand and gravel is identical. 42 F.R. 35850, § 436.31(e).

formulating a monthly average limitation." 42 F.R. 35844. The provision permitting discharge of process water for crushed stone and construction sand and gravel facilities that recycle was added when the EPA found that "a number of the facilities which currently recycle experience occasional discharges due to natural occurrences, such as rainfall or seepage." The discharge provision thus was added "to allow a limited discharge of process generated waste water pollutants." 42 F.R. 35844. Non-recycling facilities were not provided the benefits of the "limited discharge, however, because of the Agency's view that the best practicable control technology currently available for these industries includes recycling of process water." 42 F.R. 35844.

Petitioners challenge here the validity of the definition of process generated waste water contained in § 436.21(e) for crushed stone and § 436.31(e) for construction sand and gravel; the TSS limits for process generated waste water and the recycling requirement, § 436.22(a)(1) (crushed stone), § 436.32(a)(1) (construction sand and gravel); the no discharge provision for non-recycling operations, § 436.22(a)(2) (crushed stone), § 436.32(a)(2) (construction sand and gravel), and the TSS limits for mine dewatering discharges, § 436.22(a)(3) (crushed stone), § 436.32(a)(3) (construction sand and gravel). In addition, petitioners ask that the variance provisions for the crushed stone (§ 436.22) and construction sand and gravel (§ 436.32) subcategories be set aside as inconsistent with our de-

cision in *Appalachian Power Co. v. Train*, 545 F2d 1351 (4th Cir. 1976).

The standards which we must apply to the review of EPA regulations have been set out elsewhere and need not extensively be reviewed here. E.g., *Appalachian Power*, *supra*, 545 F2d at 1356-57; *duPont v. Train*, 541 F2d 1018, 1026 (4th Cir. 1976), *aff'd* in part and *rev'd* in part on other grounds, 430 U.S. 112 (1977); *Tanners' Council of America, Inc. v. Train*, 540 F2d 1188, 1191 (4th Cir. 1976). Briefly, under the Administrative Procedure Act, 5 U.S.C. § 706(2), we may not set aside the regulations unless we find their promulgation to have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," § 706(2)(A), or "without observance of procedure required by law," § 706(2)(d). In reviewing these regulations, we are further constrained by "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure," *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 46 U.S.L.W. 4301, 4307 (1978), and by provisions for rule making under the Administrative Procedure Act, 5 U.S.C. § 553, which establish "the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rule making procedures." *Id.* at 4302 (footnote omitted). However, the Agency, as noted, must act in accordance with law, and not in an arbitrary or capricious manner. Neither may it abuse its discretion. 5 U.S.C. § 706. Courts are no longer

satisfied with bare administrative *ipse dixits*, and the Agency must make reasoned decisions with full articulation of the reasoning and take into account all relevant factors. *Appalachian Power Company v. EPA*, 477 F2d 495 (4th Cir. 1973).

### *TSS Effluent Limitations*

We first consider the claim of petitioners that the regulations (42 F.R. 35850-1, §§ 436.22(a)(1), 436.22(a)(3), 436.(a)(1), 436.32(a)(3)) establishing TSS limitations for mine dewatering and process generated waste water are invalid. The EPA has admitted that certain data called the "Versar data" were used to determine the 30 day TSS average of 25 mg/1 for both crushed stone and construction sand and gravel operations, and also has admitted the Versar data were used to determine the TSS daily maximum of 45 mg/1. So, unless the use of the data is harmless, regulations based upon it must be set aside if EPA's use of the data was not in accordance with law. We think the regulations are invalid for the reasons which follow.

The June 10, 1976 "interim final regulations," although effective immediately, provided for a public comment period extending until August 9, 1976, 41 F.R. 23553, and NCSA was afforded an additional period in which to comment. NCSA took advantage of this opportunity by filing written comments with EPA. After the close of the comment period and a public hearing held on December 2, 1976, however, on December 14-16, 1976 EPA's contractor, Versar,

Inc., visited EPA's regional headquarters in Atlanta and Dallas and obtained NPDES discharge monitoring reports for various crushed stone operations. This survey, referred to as the Versar data, was completed on February 25, 1977, and on March 15, 1977 the EPA met with some representatives of the crushed stone industry, including NCSA, at which meeting the Versar data were mentioned in the conversation. This was not a public meeting or hearing but was nothing more than a conference held at the request of some members of the industry affected. Petitioners have provided affidavits from participants at the March 15th meeting which show that while the data were discussed at this meeting, they were not made available to the industry for study and analysis. In addition, although industry representatives at the meeting on March 15th requested that they be afforded access to the Versar data, the EPA refused to make the data available until after promulgation of the final regulations. EPA has not filed counter affidavits but has related in its brief that "NCSA was shown the discharge monitoring data compiling the 'Versar data' ". Thus, we are confronted with a fact situation on all fours with that considered by this court in *Appalachian Power Co. v. EPA*, No. 72-1733, — F2d — (4th Cir. June 13, 1978). There, we held that upon an affidavit presented by EPA, petitioners not offering any, in the absence of counter affidavits we would be "unwilling to conclude that the statements in the affidavits are false." Slip op. at 15, n. 15. The same result should obtain here, and we



thus accept as correct the statements in petitioners' affidavits that they were not afforded an opportunity to examine, analyze, and comment on the Versar data. The various internal memoranda relied upon by EPA do not contradict the affidavits.

The fact situation so presented to us is very nearly the same as that presented in *Portland Cement Assoc. v. Ruckelshaus*, 486 F2d 375 (D.C. Cir. 1973), in which case the court set aside certain EPA regulations. Prior to the promulgation of the regulations there set aside, the court had remanded to EPA previous regulations because test information upon which the previous regulations had been based was refuted by an engineer experienced in the subject. On remand, instead of commenting on the conclusions of the engineer upon which the remand was based, EPA merely added that analysis to the record. The court set aside the regulations, finding that the comment offered by the industry affidavits was of possible significance in the results of the test. In its discussion of the case, the court said that it found "... a critical defect in the decision making process in arriving at the standard under review in the initial inability of the petitioners to obtain—in timely fashion—the test results and procedures used in existing plants which formed a partial basis for the emission control level adopted, and in the subsequent seeming refusal of the agency to respond to what seem[s] to be legitimate problems with the methodology of those tests." p. 392. The court also stated that "it is not consonant with the purpose of a rule making pro-

ceeding to promulgate rules on the basis of inadequate data or on data that [to] critical degree is known only to the agency." While the second rule just stated was apparently applied by that court in its initial remand proceeding, it is applicable here. EPA admittedly has relied on the Versar data in promulgating the TSS regulations at issue. At the time the regulations were being formulated, only EPA knew about the data in detail. Our case and *Portland Cement* are no different in that respect. The first rule above mentioned also is applicable to this case. Although the petitioners, or some of them at least, were at the meeting on March 15th, the refusal of the agency to make the actual data available to those immediately affected by it cannot be excused. The comments of the industry following the promulgation of the interim final regulations and at the December hearing could not have anticipated use of the Versar data because the same had not even been collected by Versar at that time.

We need not, however, place sole reliance on *Portland Cement* in deciding to remand. We have held in *duPont v. Train*, 451 F2d 1018 (4th Cir. 1976), and *Appalachian Power Co.*, 477 F2d 495 (4th Cir. 1973), that an agency engaged in rule making must "explicate fully its course of inquiry, its analysis and its reasoning." 541 F2d at 1026, 477 F2d at 507. In the case before us, EPA candidly admits that "the development document does not discuss the calculation process by which the agency arrived at the monthly average limit." That amounts to no less than an

admission that the regulation is invalid unless something else appears to render the omission harmless. While EPA, in its brief, does attempt to justify "the path of the administrator's reasoning," it has shown us no reason not to apply our holding in *duPont* that "after the fact rationalization by counsel in brief and argument does not cure non-compliance by the Agency with the stated principles." 541 F2d at 1026. See also *Portland Cement* at p. 395.

The justification offered by EPA in its brief for its failure to give the reasoning behind the new TSS standards is that the 25 mg/1 daily limit was a monthly average from the Versar data, and that the 45 mg/1 daily maximum was an increase sought by industry. The last of the reasons given by EPA is insufficient on its face, for the comments by industry seeking a higher daily maximum discharge limit were in the context of the interim final regulations which had rejected an average discharge limit in favor of a limit for each day. What industry sought was a higher limit for each day, which in fact was effectively lowered on a monthly basis by the new regulation.

More importantly, however, the petitioners never had a chance to respond to the Versar data before the promulgation of the final regulations. This is not consistent with the requirements of law. See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, n. 4 (1974), and *Granite City Steel Co. v. EPA*, 501 F2d 925 (7th Cir. 1974).

EPA argues that in all events the use of the Versar

data, however, is harmless because the increase in the maximum limit for any one day from 30 to 45 mg/1 more than compensates for the imposition of a monthly maximum average of 25 mg/1, so that, in fact, EPA increased the discharge limits rather than decreased them. The industry contests this conclusion, and EPA calls our attention to no data to corroborate its position.

Following the promulgation of the final regulations, the petitioners did very much the same as the petitioners in *Portland Cement*. They secured a report by an engineer who was an expert in the field, who took serious issue with the Versar data base on more than one ground. In his opinion the data were insufficient upon which to base the new regulations in many respects, among them; from a practical operating standpoint, the final regulations are more restrictive than the interim final regulations; EPA did not consider the technical feasibility or economic impact of the increase in settling pond size caused by discharging at 25 mg/1 rather than 30 mg/1; seventy-five percent of the permits surveyed were in three States, and over 50 percent in two States, although the industry is scattered nationwide and conditions differ widely; the types of rock mined in the quarries from which the Versar data came was not typical of all of the industry, especially the settling characteristics of the rock from which the Versar data came might well be different from rock in other parts of the country, and as well the settling characteristics in different climates are different; the Versar memorandum does not state the adequacy of

its data for statistical analysis; the TSS limitations were arbitrarily selected without benefit of a statistical basis. The objections go on and on, but enough have been related to show that they are far from frivolous, and while EPA will undoubtedly take issue with the report of the engineer, we need not, and do not, decide whether the objections raised in the engineer's report are valid. What we do decide is that the mistakes in the use of the Versar data, if any mistakes there were, were shown by the report to be of possible significance in the formulation of the final regulations. *Portland Cement* at p. 394. The engineer's report we have referred to raises significant questions as to the statistical validity of the Versar data, as well as to whether or not the data from that limited base could reliably be used in formulating national regulations. The fact that the petitioners, and just as importantly the fact that the public, had no opportunity to comment on the use of the Versar data prior to the promulgation of the final regulations in the face of serious questions concerning the validity of their use is reason to remand the regulations for further consideration.<sup>11</sup> When this is coupled with

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<sup>11</sup> We have not discussed the defects in procedure wholly on the basis of public or private right, for they are intertwined in this case. The Agency's own regulations provide that it shall make available "continuing policy, program, and technical information at the earliest practicable times and at places easily accessible to interested or affected persons and organizations so that they can make informed and instructive contributions to governmental decision making." 40 C.F.R. § 105.4(a). The regulations also provide that "conferring

the fact that the Agency admits that it did not explain the reasons for its actions, the obvious question arises as to whether or not they could have been justified in the record before the Agency.

We remand the TSS limitations to the Agency for reconsideration.<sup>12</sup>

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with the public after a final Agency decision has been made will not meet the requirements of this part," and by that "part" the regulations refer to "active public involvement in and scrutiny of the inter-departmental decision making process." 40 C.F.R. § 105.2. EPA did not make available the Versar data at any time, much less the earliest practicable time. Neither did the public nor the petitioners have a chance to comment on it until after the final Agency decision. A good discussion of the subject is found in Wright, *The Courts and the Rule Making Process: The Limits of Judicial Review*, 59 Cornell IR 375 (1974). In this respect, because we have set aside the regulations complained of on other grounds, we need not consider the use of a certain summary supplied by way of comment by the National Limestone Institute which EPA admittedly used in promulgating the final regulations. There is a dispute over whether or not the National Limestone Institute survey was available to the petitioners.

However, there seems to be no dispute that it was not available to the public, or at least there was no notice to the public that it was being relied upon.

<sup>12</sup> The EPA has confessed error in its brief for its failure to provide petitioners Warren Brothers and Arkhola Sand and Gravel with an opportunity to comment upon the Versar data used by the Agency in setting the monthly TSS average for construction sand and gravel plants. EPA brief at 18, n. 15. Since the Agency admits the Versar data also were used in setting the 45 mg/1 daily maximum, we do not think the EPA's confession of error should be confined to the 30 day average. In addition, we note that Warren Brothers had precisely made clear to the EPA its concern with the crushed stone as well as the sand and gravel limitations. As a result,

### *Recycling Provisions*

The next point which we consider is the contention that the recycling provisions (42 F.R. 35850-1, §§ 436.22(a)(1), 436.32(a)(1)) of the final regulations are invalid. Recycling was not mentioned in any way in the interim final regulations, and there was no requirement in them to recycle. The word simply does not appear. It is true that in the technical summary accompanying the interim final regulations in connection with zero discharge for process generated waste water that recycling was mentioned as an available technology. Also, for construction sand and gravel facilities, recycling was apparently contemplated as a requirement for discharge of process generated waste water when commingled with mine water. Recycling was also referred to as a treatment technology in the economic analysis. But the recycling technology for construction sand and gravel facilities was specifically rejected for the interim final regulations in that the technical summary provided that "treatment other than single settling ponds followed by recycling may be the only economically viable technology." With the technical summary which is at least confusing, the interim final regulations themselves specifically provided, for construction sand and gravel facilities, that process generated waste water, when commingled with other waste water, could be

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EPA's confession of error should be extended to the daily maximum and monthly average TSS limitation in both the crushed stone and sand and gravel subcategories. We consider this an alternate reason for setting aside the regulations.

discharged without recycling providing the numbered effluent limitations were met. The case was not quite the same in the interim final regulations for the crushed stone facilities. The interim final regulations contemplated that process generated waste water be kept separate from other waste water, and while providing a zero discharge limit for process generated waste water, allowed discharge of mine dewatering water providing the numbered effluent limitations were met.

Comments from the industry on the no discharge provision for process generated waste water, as EPA acknowledges, sought to provide for the crushed stone industry the same right to discharge the commingled waters that EPA had allowed the construction sand and gravel industry in the interim final regulations without recycling.

With this background, the final regulations were promulgated. Petitioners make a multitude of objections to them, of which we will discuss only a few.

First, the term recycle is not defined in the regulations. This may seem somewhat remarkable because the recycling requirement is acknowledged to be a major change between the interim final and the final regulations. This aside, nowhere in the regulations can it be found what part or what volume of the process generated waste water must be recycled to get the benefit of the discharge provisions. If petitioners claim, as EPA claims that they do, that total recycling is required, that term is not defined. If the requirement is partial recycling as EPA claims,



then that term is not defined. There simply is no definition.<sup>13</sup> EPA claims in its brief that the answer is apparent, that "all the water used in the industrial process must be obtained from the treatment system itself." But then it adds that "excess water can be treated prior to discharge," referring to the addition of water from outside the mine to use in the industrial process. If this is a definition, it is not found in the regulations, rather in the brief.

The fact that the regulations do not define recycling may well make them void for vagueness under our decision in *duPont*, at p. 1033, where we set aside an EPA regulation because we were "not sure what it means in the context in which it is used." That reasoning might well apply here even if this were the only objection, but there is a more basic fundamental objection to the recycling requirement.

We take it from all the record in this case that in the usual wet operation for both crushed stone and construction sand and gravel that the water used in the industrial process, generally speaking, comes from within the mine or quarry, whether it be from a settling pond or from some other source.<sup>14</sup> Assuming

<sup>13</sup> Various terms are defined in the regulations. A glossary to the development document defines many more. Recycle is not among them.

<sup>14</sup> There is a dispute over whether or not the water for the industrial process in a typical wet operation comes from within the mine or quarry. The engineer's report offered by petitioners previously referred to states that it does. Petitioners in their second reply brief state that it does and offer to corroborate the fact. EPA in its second reply brief con-

only that fact, then, the petitioners claim, and EPA points to nothing in the record to refute the fact, that the recycling requirement results in not one bit less discharge of pollutants into the navigable streams than the technology which petitioners claim should be the best practicable, that is allowing settling and discharge without recycling. In its brief, EPA argues that this claim of petitioners is without merit because some water may be lost by evaporation and some may be carried off on the product. But it points to no technical data to support its argument. Without the

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tests the fact, although in its first brief its argument that total recycle means all process water coming from within the system may lend some support to petitioners' view, but this is qualified by mention of added water from without the quarry or mine. The development document does not address the question. It lists the sources of process water as quarries, wells, rivers, company-owned ponds, and settling ponds, with no attempt at stating the source for a typical or ordinary operation. EPA contends in its second reply brief that only about half the quarries it studied dewater their quarries at all. We are unable to determine from this record the facts to ascertain which position is correct, but even assuming the correctness of EPA's apparent position that many quarries do not obtain their process water from within the mine or quarry, we especially note that EPA does not deny that many quarries do. That being true, and nothing in the record suggests that it is not, the very difficult question for EPA arises as to whether or not EPA, in any event, may make a rational decision which would impose upon a substantial part of an industry a burdensome and costly requirement which, if needed at all, is only needed in another part of the same industry. We do not attempt to answer that question on this record, but the fact that it is a serious question and is suggested by the record is not refuted by any argument EPA makes in the case.

benefit of an engineering opinion on the point, it would seem to us that if water is used to wash the stone or the sand and the water comes from within the mine, whether from settling pond or otherwise, that the same amount of water is going to be carried out on the finished product regardless of whether it is pumped from the settling pond or from somewhere else. Also, if there is a given amount of water within the mine from whatever source, and evaporation takes place from exposed surface areas, including the industrial process, explanation is required to show why any more water would evaporate in a system utilizing recycling when compared with one which did not. We do not say that petitioners' position will turn out to be correct, but the record before us does not show it to be incorrect, and it is supported by logic. We decline to accept EPA's position absent record support.

On the record before us, it is not shown that the addition of the recycling requirement, although admittedly costly and burdensome, will result in any reduction in the discharge of pollutants into the navigable waters. Indeed, EPA as much as acknowledges that absent evaporation and the water carried out on the product petitioners' premise is correct. This state of facts, then, makes applicable our ruling in *duPont*, at p. 1034, concerning the no discharge provision for plants using the electrolytic process for making hydrogen peroxide. In that case, one plant using a process unique to the industry in this country had a negligible difference in the quality of influent

well water and effluent discharge. We noted that the discharges were environmentally insignificant, and importantly we then followed with the statement that "we cannot comprehend how a change from the present to the EPA technology, evaporation and landfill will be beneficial. . . . On reconsideration, [for additional reasons] EPA must give consideration to the total environmental impact."

That holding also applies here. If the requirement of settling plus recycling results in no more benefit to the environment than simply resettling without recycling, then the recycling requirement may not be the best practicable control technology currently available, but only a burdensome and expensive addition. If EPA's argument is valid, that evaporation and the water carried out on the product result in less pollutants being discharged into the waters, then EPA must at least explain how much less pollutants will be discharged and what the additional cost will be for discharging the lower amount of pollutants. None of these subjects are addressed in the record. See *Appalachian Power Co. v. Train*, 545 F2d 1351, 1364 (4th Cir. 1976).

Parenthetically, we note that, especially for the construction sand and gravel industry,<sup>15</sup> and, to a lesser extent for the crushed stone industry, the prob-

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<sup>15</sup> The construction sand and gravel industry was permitted to discharge, if effluent limitations were met, commingled waste water without recycling under the interim final regulations. The final regulations reversed this policy without notice.

lems we have just mentioned concerning recycling could have as easily been avoided as those in the TSS context if only EPA had provided a fair notice of what it was doing with the reasons therefor and made available in time to allow for intelligent comment all of the technical data upon which it acted.

We thus remand the recycling provisions to the Agency for further consideration.

#### *No Discharge Provisions*

(42 F.R. 35850-1, §§ 436.22(a)(2), 436.32(a)(2))

The zero discharge requirement for process generated waste water in the interim final regulations (41 F.R. 23558-9, §§ 436.22(a)(1), 436.32(a)(1)) was absolute for the crushed stone industry because those regulations did not contemplate the commingling of process generated waste water with other waste water. It was also absolute for plants in the construction sand and gravel industry which did not commingle process generated waste water with mine dewatering water but permitted discharge without recycling for construction sand and gravel facilities which did so commingle. 41 F.R. 23559, § 436.32(a)(3). In the final regulations, the no discharge requirement for process generated waste water is the same for both industries, that is to say, no discharge for facilities which do not recycle but not applicable to those which do. As we have previously pointed out, recycling was not mentioned in the interim final regulations. The condition for both indus-

tries in the final regulations permitting discharge is recycling, which we have set aside. The condition being set aside, the no discharge provisions should be remanded for reconsideration by the Agency. We do not think the no discharge provisions are meant to stand alone. They were made a part of the final regulations in what EPA contends was an amelioration of the stringency of the interim final regulations in response to industry comments. They can hardly be considered an amelioration if they stand in their original form. Also, on remand, should EPA's position on the recycling requirement turn out to be not well taken, then it may well decide to omit the recycling requirement which might permit the discharge after settling of commingled process generated waste water and mine water provided numbered effluent limitations are met.

The no discharge provisions are therefore remanded to the Agency for reconsideration.

#### *Variance Provisions*

Petitioners also raise the question of whether the crushed stone (42 F.R. 35849, § 436.22) and construction sand and gravel (42 F.R. 35850, § 436.32) variance provisions comport with the decision of this court in *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1358-60 (4th Cir. 1976), in which case we set aside a variance clause for steam electric power point sources worded substantially the same as the variance provision now under review. Here, as in *Appalachian Power*, the EPA proposes to grant a

variance from the 1977 BPT standards only where "factors relating to the equipment or facilities involved, the process applied, or other such factors relating to such discharges are fundamentally different from the factors considered in the establishment of the guidelines." Compare 40 C.F.R. § 423.12(a) (1977) with 42 F.R. 35850, §§ 436.22, 436.32, which show the variance provisions in *Appalachian Power* and the ones before us to be in the same words.

We held in *Appalachian Power* that the variance clause was "unduly restrictive," 545 F.2d at 1359, and ordered a remand to the Agency for the development of "a meaningful variance clause" that would permit economic and other factors to be considered. *Id.* at 1359-60. The EPA, however, argues that *Appalachian Power* is not applicable here because review of the variance provision would be premature prior to any actual claim for a variance in a discharge permit application. See *E. I. duPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1028 (4th Cir. 1976), *aff'd* on this ground, 430 U.S. 112, 128, n. 19 (1977). In *Appalachian Power*, however, we distinguished our decision in *duPont*, that review of the variance provision would be premature and speculative, because EPA had indicated its refusal in two administrative opinions to consider economic factors in considering variance requests. 545 F.2d at 1357-60, n. 22; 39 F.R. 28926-7, dated August 2, 1974, and 39 F.R. 30073 dated August 13, 1974.

We are of opinion the same distinction applies here, but with added background. On March 3, 1978,

the EPA announced its proposed amendments to the steam electric power variance provision we set aside in *Appalachian Power*. 43 F.R. 8812, 8813. Referring to our decision in *Appalachian Power*, the EPA announced this change: "In accordance with the Court's opinion, the [new] variance clause would allow the permit issuers to consider 'significant cost differentials' and other economic factors applicable to the particular source involved." 43 F.R. 8813. But the EPA further stated "[t]his change applies only to steam electric power plants. . . . For categories other than steam electric power plants, economic factors will not be considered in ruling on BPT variance requests. . . ." The final steam electric variance amendment appears at 43 F.R. at 43023 et seq., and 44846 (corrected), dated September 22 and 29, 1978, where the same position was taken.

In the meantime, however, despite EPA's continued assertions that "economic factors" should be "[exclude[d)]" in all categories of industry regulated by EPA other than steam electric power generation, the administrator, on ruling on a variance in the case of *In re Louisiana-Pacific Corp., et al.*, 10 E.R.C. 1841 (Sept. 15, 1977), had recited that the cost of application of the required technology was a major relevant fact. Despite this recitation, however, EPA did not change its stated position until after this case was submitted; and the final regulations effecting a change in position are not yet in effect.

On October 17, 1978, the general counsel for EPA withdrew the interpretations of August 1974 upon



which we had relied in *Appalachian Power* in holding that the construction of the variance clause was ripe for review and not premature. 43 F.R. 50042. That withdrawal had been preceded by only a few weeks by the promulgation, on August 21, 1978, of proposed variance provisions which would have made a significant departure from EPA's previous position and put the Agency more in line with our opinion in *Appalachian Power*. 43 F.R. 37132. The proposed provisions apparently would apply both to the crushed stone and construction sand and gravel industries, and together with the revocation by EPA of the August 1974 interpretations the matter might be moot were it not for one additional fact. In the paper published in 43 F.R. 50042 withdrawing the August 1974 interpretations, the administrator specifically noted that "EPA continues to believe that § 301(c) of the Clean Water Act (allowing waivers based upon plant-specific economic capability or 'affordability') applies only to best available technology (BAT) limitations."

That construction places EPA squarely in conflict with the rule in *Appalachian Power* which we have referred to. That case, on page 1359-1366, specifically required EPA to take into consideration, among other things, the statutory factors set out in § 301(c). EPA is well aware of our position, for, in *Appalachian Power*, in an order filed September 26, 1977, following the Supreme Court decision in *duPont*, the same point was made in a motion to us to amend our opinion. The request was denied.

In passing, we should note several arguments of EPA which are not well taken. First, EPA argues that our ruling demands variance requests be based on water quality standards rather than effluent limitations. We rejected that point of view in *Appalachian Power Company* at page 1378. Second, the administrative action of EPA of October 17, 1978, 43 F.R. 50042, strongly implies that our requirement that § 301(c) factors be at least considered in determining whether or not to grant a variance means that a plant may "secure a BPT variance by alleging [and proving] that the plant's own financial status is such that it cannot afford to comply with the national BPT limitation." Like the previous EPA argument, this argument was also specifically rejected by us in *Appalachian Power*, where we said, with reference to the § 301(c) factors, that "if it is doing all that the maximum use of technology within its economic capability will permit *and* if such use will result in reasonable further progress toward the elimination of the discharge of pollutants . . . no reason appears why Consolidated Edison should not be able to secure such a variance should it comply with any other requirements of the variance." (Emphasis in original)

EPA's arguments as to water quality standards and as to its interpretation of the consideration of costs under § 301(c) are no better than straw men. Both positions have been previously considered by this court and rejected. They are not even argued by petitioners whose argument here largely is devoted to

other specific factors they claim should be considered in determining whether or not to grant a variance.

Finally, we should say that our construction of the variance provisions seems to be generally, if not precisely, in accord with that of the court in *Weyerhaeuser Co. v. Costle*, Nos. 76-1674, et al., 11 E.R.C. 2149 (D.C. Cir. 1978). That court analogized the 1983 variance provisions with the 1977 provisions, drawing upon the Supreme Court opinion in *duPont* as its authority. In summary, *Weyerhaeuser* held that a 1977 variance clause must be analogous to the 1983 variance clause, and that EPA's application of the 1977 variance clause must bear a similar relationship to the 1977 standards as the 1983 variance clause bears to 1983 standards. We have held, in *Appalachian Power Co.*, that EPA, in promulgating regulations under the 1977 variance clause, may not exclude the factors to be considered in granting variances under the 1983 standards because the statute contemplates there may be more stringent standards for 1983. While the 1983 standards are not before us for review, we note in the development document that the contractor recommends both pH and TSS limits for 1983 be the same as for 1977. Especially in a case where the effluent limits are the same, but in any case, we think the statute is not meant to stop the operation of a plant in 1979 under 1977 standards under more strict conditions than would apply to a plant operating in 1983 under standards for that year. This situation could easily close a plant in 1979 which would be allowed to operate under a variance in 1983.

Accordingly, we remand the variance provisions to the Agency for compliance with *Appalachian Power Company*.

#### *Definition of Process Generated Waste Water*

Finally, we consider the petitioner's contention that the definitions of process generated waste water in the final regulations (42 F.R. 35849-50, §§ 436.21(e), 436.31(e)) are so different from the definitions in the interim final regulations (41 F.R. 23558-9, §§ 436.21(e), 436.31(e)) that they must be set aside.

The addition in the final regulations about which complaint is made is that process generated waste water "shall also include any other water which becomes commingled with such waste water in a pit, pond, lagoon, mine, or other facility used for treatment of such waste water."

Petitioners view the change as having significantly expanded the definition of process generated waste water, and indeed it has. But we doubt the definition is invalid on its face, for when we take into account the practical consideration that the commingling is done in a settling pond or even in another part of a mine or quarry, and that one, if not the, principal controversy before us seems to be whether effluent discharge of commingled waters meeting numbered effluent limitations is permissible without recycling, then we think the regulation could have a place in the scheme of regulation. This does not take into account, of course, lack of notice. Neither does it take into account the fact that the definition of proc-

ess generated waste water is completely intertwined with the controversy concerning effluent discharge and the recycling provisions.

Because of this, we think the proper course to take with respect to these regulations is to decline to act on them at this time in view of our remand of certain other regulations in this decision. On remand, petitioners should be allowed to comment on the regulations, and if they appear before us again, we will have them in the context of their accompanying regulations and will be in a better position to express an opinion on their validity, both for that reason and because accompanied by comment.

We, therefore, decline to express an opinion upon the validity of the expanded definition of process generated waste water at this time without prejudice to the matter being raised in a subsequent petition following the remand of this case to EPA and its reconsideration of the other regulations we have discussed in this case.

#### *Other Matters Raised in Briefs*

The petitioners also have asked us to set aside the regulations for industries which did not have the required technology in place by July 1, 1977 on the ground that the July 1, 1977 deadline for compliance with them had passed before the regulations were promulgated on July 12, 1977, to be effective August 11, 1977.

It is apparent that the petitioners' position raises what may be serious questions of statutory construc-

tion as well as constitutional limitations, and because we have remanded the contested regulations on other grounds, we do not express an opinion on those questions.

The fact that we may not have mentioned many of the points raised in the briefs should not infer any opinion of ours as to their merit.

#### *Conclusion*

The following regulations are remanded to the Agency for reconsideration:

#### *Crushed Stone Subcategories*

##### *Section*

§ 436.22 (variance clause)

§ 436.22(a)(1) (TSS limits for process generated waste water and recycling requirement)

§ 436.22(a)(2) (no discharge provision)

§ 436.22(a)(3) (TSS limits for mine dewatering discharge)

#### *Construction Sand and Gravel Subcategories*

§ 436.32 (variance clause)

§ 436.32(a)(1) (TSS limits for process generated waste water and recycling requirement)

§ 436.32(a)(2) (no discharge provision)

§ 436.32(a)(3) (TSS limits for mine dewatering discharge)

## APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

76-1914

[Filed Jun. 18, 1979]

NATIONAL CRUSHED STONE ASSOCIATION, INC.,  
and LUCK QUARRIES, INC., PETITIONERS

vs.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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ON PETITION FOR REVIEW OF AN ORDER OF THE  
ENVIRONMENTAL PROTECTION AGENCY

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THIS CAUSE came on to be heard upon the petition of National Crushed Stone Association, Inc., and Luck Quarries, Inc., for review of an order issued by the Environmental Protection Agency entitled "Effluent Guidelines and Standards for Mineral Mining and Processing Point Source Category," 41 Fed. Reg. 23552-23560 (June 10, 1979), Subparts B, §§ 436.20, 436.21 and 436.22; upon the certified index to the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the following regulations are remanded to the Agency for reconsideration consistent with the opinion of this Court filed herewith:

*Crushed Stone Subcategories**Section*

§ 436.22 (variance clause)

§ 436.22(a)(1) (TSS limits for process generated waste water and recycling requirement)

§ 436.22(a)(2) (no discharge provision)

§ 436.22(a)(3) (TSS limits for mine dewatering discharge)

*Construction Sand and Gravel Subcategories*

§ 436.32 (variance clause)

§ 436.32(a)(1) (TSS limits for process generated waste water and recycling requirement)

§ 436.32(a)(2) (no discharge provision)

§ 436.32(a)(3) (TSS limits for mine dewatering discharge)

WILLIAM K. SLATE, II  
Clerk



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APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 76-1690

CONSOLIDATION COAL COMPANY, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-1859

BETHLEHEM STEEL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-1862

NATIONAL COAL ASSOCIATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT  
WEST VIRGINIA CITIZEN ACTION GROUP, INTERVENOR

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No. 76-1912

PEABODY COAL COMPANY, a corporation, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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41a

No. 76-1981

GIBRALTER COAL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-1982

AMAX, INC., on behalf of its Amax Coal  
Company Division, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-2019

THE DRUMMOND COMPANY, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-2020

SAVE OUR CUMBERLAND MOUNTAINS, INC.  
and CITIZENS LEAGUE TO PROTECT THE  
SURFACE RIGHTS, INC., PETITIONERS

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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42a

No. 76-2059

NORTH AMERICAN COAL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 76-2145

NATIONAL STEEL CORPORATION, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 76-2146

REPUBLIC STEEL CORPORATION, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 76-2147

UNITED STATES STEEL CORPORATION, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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No. 77-1474

NATIONAL COAL ASSOCIATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1490

CONSOLIDATION COAL COMPANY, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1491

BETHLEHEM STEEL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1534

THE DRUMMOND COMPANY, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1592

NATIONAL STEEL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1593

REPUBLIC STEEL CORPORATION, PETITIONER

*versus*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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No. 77-1594

UNITED STATES STEEL CORPORATION, PETITIONER

*versus*DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

No. 77-1828

PEABODY COAL COMPANY, a corporation, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 77-1845

WEST VIRGINIA-CITIZEN ACTION GROUP, INC.,  
MOUNTAIN COMMUNITY UNION, INC., and  
SAVE OUR MOUNTAINS, INC., PETITIONERS*versus*DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

No. 77-1892

SAVE OUR CUMBERLAND MOUNTAINS, INC.,  
and CITIZENS LEAGUE TO PROTECT THE  
SURFACE RIGHTS, INC., PETITIONERS*versus*DOUGLAS M. COSTLE, Administrator,  
Environmental Protection Agency, RESPONDENT

No. 77-1893

NORTH AMERICAN COAL CORPORATION, PETITIONER

*versus*DOUGLAS M. COSTLE, Administrator,  
Environmental Protection Agency, RESPONDENT

No. 77-1957

CEDAR COAL COMPANY, CENTRAL APPALACHIAN COAL  
COMPANY, CENTRAL COAL COMPANY, CENTRAL  
OHIO COAL COMPANY, SOUTHERN APPALACHIAN  
COAL COMPANY, SOUTHERN OHIO COAL COMPANY,  
and, WINDSOR POWER HOUSE COAL COMPANY, PE-  
TITIONERS*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 77-1989

AMAX INC., on behalf of its Amax Coal  
Company Division, PETITIONER*versus*DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

No. 77-1990

GIBRALTAR COAL CORPORATION, PETITIONER

*versus*DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

No. 77-2088

COMMONWEALTH OF PENNSYLVANIA, Department  
of Environmental Resources, PETITIONER

*versus*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE  
ENVIRONMENTAL PROTECTION AGENCY

Argued October 5, 1978

Decided June 25, 1979

Before BUTZNER, WIDENER and HALL, Circuit Judges

BUTZNER, Circuit Judge:

In 27 consolidated cases, 17 coal producers, their trade association, 5 citizens' environmental associations, and the Commonwealth of Pennsylvania seek review, pursuant to 33 U.S.C. § 1369(b)(1)(E), of water pollution control regulations for existing facilities in the coal industry promulgated by the administrator of the Environmental Protection Agency.<sup>1</sup> We uphold the regulations with the exception of a clause establishing criteria for variances.

<sup>1</sup> See *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977), for a discussion of the jurisdiction of courts of appeals to review these regulations.

I

The Federal Water Pollution Control Act of 1972 is a legislative mandate to restore and maintain the chemical, physical, and biological integrity of the nation's waters.<sup>2</sup> The Act sets a national goal to eliminate the discharge of pollutants into the navigable waters by 1985.<sup>3</sup>

As the first step toward the 1985 goal,<sup>4</sup> Congress provided in § 301(b)(1)(A) of the Act<sup>5</sup> that

there shall be achieved . . . not later than July 1, 1977, effluent limitations for point sources [of water pollution], other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator [of the Environmental Protection Agency] pursuant to § 304(b) . . . .

This provision for effluent limitations marked a major change from prior law. Before the 1972 Act, water pollution control had been based upon water quality standards specifying the acceptable levels of pollution in the navigable waters. The program proved ineffective in part because the standards focused on the tolerable effects rather than the preventable causes of water pollution. Effluent limita-

<sup>2</sup> 33 U.S.C. §§ 1251-1376.

<sup>3</sup> 33 U.S.C. § 1251(a).

<sup>4</sup> The Act contemplates a two-phase reduction in pollutant discharges. Second-phase standards (§ 301(b)(2) [33 U.S.C. § 1311(b)(2)]) are not in issue here.

<sup>5</sup> 33 U.S.C. § 1311(b)(1)(A).



tions eliminate this problem because they directly restrict the concentrations of pollutants that may be discharged by any plant in a given industrial subcategory."

Section 304(b)(1)<sup>7</sup> requires the Administrator to publish regulations which must

identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources . . . and specify factors to be taken into account in determining the control measures and practices to be applicable to point sources . . . within such categories or classes.

The administrator promulgated final water pollution control regulations for existing plants in the coal industry on April 26, 1977.<sup>8</sup> The regulations divide the industry into two categories—(1) coal mines and (2) coal preparation plants and associated areas. These categories are each subdivided according to acidic and alkaline discharges. For each of the resulting subcategories, the regulations establish maxi-

<sup>6</sup> *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 202-05 (1976).

<sup>7</sup> 33 U.S.C. § 1314(b)(1).

<sup>8</sup> 42 Fed. Reg. 21380-21390 (April 26, 1977), adding certain parts of 40 C.F.R. Part 434. Regulations governing "new source" coal production facilities were promulgated separately and are not before us in these cases. *See* 44 Fed. Reg. 2586-2592 (Jan. 12, 1979).

mum concentrations of iron and total suspended solids. They also limit the permissible range of acidity and alkalinity of discharge water, and they restrict manganese concentrations in acidic drainage. None of the petitions before us challenges these maxima.<sup>9</sup> The petitions question the validity of seven aspects of the regulations which we will discuss in parts II-VIII of this opinion.

Our review is governed by § 10(e)(2) of the Administrative Procedure Act.<sup>10</sup> We must set aside any portion of the 1977 effluent limitations that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" is in excess of statutory authority; or is "without observance of procedure required by law."<sup>11</sup> The ultimate standard of review is narrow. This court is not empowered to substitute its judgment for that of the agency.<sup>12</sup> The Federal Water Pollution Control Act is to be given the broadest possible reading consistent with the commerce

<sup>9</sup> The administrator's brief states that this is the first case brought to review best practicable control technology standards in which the numerical national limitations have not been attacked.

<sup>10</sup> 5 U.S.C. § 706(2). *See* *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024-28 (D.C. Cir. 1978); *see generally* D. Currie, *Judicial Review under Federal Pollution Laws*, 62 Iowa L. Rev. 1221 (1977).

<sup>11</sup> 5 U.S.C. § 706(2); *see* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-17 (1971).

<sup>12</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 416.

clause,<sup>13</sup> and ambiguities as to the administrator's powers under the Act are to be resolved in his favor.<sup>14</sup> Congress has required the agency to act quickly and decisively despite a recognized absence of exact data on pollution control technology, and we must hesitate to draw substantive conclusions differing from those of the agency in this area of imprecise knowledge. An overly expansive exercise of the judicial review power can impede accomplishment of the Act's goal of eliminating water pollution and thwart its requirement of national uniformity in effluent reduction technology.

## II. Variance—Statutory Factors

The industrial petitioners challenge the "fundamentally different factors" variance clause contained in the regulations<sup>16</sup> complaining that this provision

<sup>13</sup> *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 755-55 (9th Cir. 1978); *Minnesota v. Hoffman*, 543 F.2d 1198, 1200 n.1 (8th Cir. 1976).

<sup>14</sup> *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 128 (1977); *Inland Steel Co. v. EPA*, 574 F.2d 367, 373 (7th Cir. 1978).

<sup>15</sup> *Weyerhaeuser Co. v. Costle*, 590 F.2d at 1025.

<sup>16</sup> The variance clause, contained in 40 C.F.R. §§ 434.22, 434.32, and 434.42 (1977) provides:

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels estab-

fails to require the permit issuer to consider the factors set forth in §§ 304(b)(1)(B)<sup>17</sup> and 301(c)<sup>18</sup> of the Act.

lished. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence . . . that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. . . . If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations . . . either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors.

<sup>17</sup> 33 U.S.C. § 1314(b)(1)(B). This section provides in pertinent part that

factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

<sup>18</sup> 33 U.S.C. § 1311(c). This section provides that the Administrator may modify the 1984 second-stage pollution control requirements

upon a showing by the owner or operator of [a] point source that such modified requirements (1) will repre-

An identical variance clause was before the court in *National Crushed Stone Association v. EPA*,<sup>19</sup> which controls our disposition of this issue. *National Crushed Stone* holds that the clause is unduly restrictive, relying on *Appalachian Power Co. v. EPA*.<sup>20</sup> Accordingly, we set aside the variance clauses contained in 40 C.F.R. §§ 434.22, 434.32, and 434.42 and remand them for revision to conform with *National Crushed Stone*.

### III. Variance—Environmental Benefits

The industrial petitioners also insist that the regulations dealing with variances must be disapproved because they fail to require the agency to consider the environmental benefits of applying the effluent limitations to a particular source of pollution. The only specific error they attribute to the regulations is the absence of a provision requiring the agency to take into account the quality of the receiving water when it decides whether to grant a variance.

At the outset, we reject the agency's argument that consideration of this aspect of the variance regulations would be premature. In a recent adjudicatory proceeding, the administrator unequivocally ruled that the Act and, consequently, the regulations, do not

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sent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

<sup>19</sup> — F.2d —, No. 76-1914 (4th Cir., June 18, 1979).

<sup>20</sup> 545 F.2d 1351 (4th Cir. 1976).

authorize him to grant a variance to an industrial discharger by providing "relief from technology-based effluent limitations guidelines due solely to the characteristics of particular receiving waters . . . ." <sup>21</sup> Since the administrator's interpretation of the regulations precludes any speculation about its meaning, review is not premature.<sup>22</sup> We therefore turn to the merits of the petition.

The pertinent regulations authorize the administrator to allow deviations from the national effluent limitations if factors peculiar to a specific source of pollution are fundamentally different from the factors considered in the establishment of the guidelines.<sup>23</sup> The precise issue, therefore, is whether the factors peculiar to a source of pollution must include comparison of the expected improvements in the receiving water with the cost of achieving them. We dealt with this issue in *Appalachian Power*,<sup>24</sup> where, in response to Consolidated Edison's request to be relieved of the effluent guidelines, we said:

[S]o far as its petition may be read as a request for leniency because of the already polluted condition of the harbor, it must be rejected. The 1972 amendments to the statute changed the system from that of control of the quality of the

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<sup>21</sup> *In re Louisiana-Pacific Corp.*, 10 E.R.C. at 1854.

<sup>22</sup> *See Appalachian Power*, 545 F.2d at 1359.

<sup>23</sup> *See* n.16, *supra*.

<sup>24</sup> 545 F.2d at 1378.

body of water to effluent limitations as we have before noted.

The Court of Appeals for the District of Columbia Circuit also examined this issue in *Weyerhaeuser Co. v. Costle*,<sup>25</sup> and affirmed the administrator's refusal to consider receiving water quality in setting limitations.

These decisions recognize that after many years of experimenting with pollution control laws, Congress determined that emphasis on receiving water quality instead of effluent reduction technology was unacceptable for control of private sources of pollution. With exceptions not germane to this opinion, Congress has now mandated that even if the application of the best practicable control technology to a specific source of pollution results in no significant improvement in the quality of the receiving water, that technology must still be applied. Commenting on the change in the scheme for elimination of pollution, the Supreme Court said:

[A] discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform.<sup>26</sup>

Any possible doubt about congressional intent to preclude consideration of receiving water quality in

<sup>25</sup> 590 F.2d 1011, 1041-44 (D.C. Cir. 1978).

<sup>26</sup> *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. at 204-05.

industrial variance rulings was put to rest in 1977. While considering legislation necessary for mid-course corrections in the federal water pollution control program, Congress heard evidence about the asserted inequity of technology-based standards.<sup>27</sup> In the resulting amendments,<sup>28</sup> Congress permitted consideration of receiving water quality as a basis for less stringent discharge standards in one situation: discharges from publicly owned treatment works into marine waters.<sup>29</sup> The intent to restrict this exception to municipalities is clear from the amendments and their legislative history.<sup>30</sup>

We therefore conclude that the variance regulations as interpreted by the administrator properly exclude consideration of the quality of the receiving water.

<sup>27</sup> See, e.g., Federal Water Pollution Control Act Amendments of 1977, Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 95th Cong., 1st Sess., Part 10 at 540-41 (1977).

<sup>28</sup> Act of Dec. 27, 1977 Pub. L. 95-217, 91 Stat. 1567, amending 33 U.S.C. (Clean Water Act of 1977).

<sup>29</sup> See 33 U.S.C. § 1311 (h).

<sup>30</sup> See 33 U.S.C. § 1311 (h); S. Rep. No. 95-370 on S. 1952, 95th Cong., 1st Sess. 45, 1977 U.S. Code Cong. & Admin. News 4370. The only provision for less stringent discharge standards based upon receiving water quality in the 1972 Act pertained to thermal discharges which are not in issue here. See 33 U.S.C. § 1326 (a); *In re Louisiana-Pacific Corp.*, 10 E.R.C. at 1848-50. In all other respects, the 1972 Act allowed consideration of receiving water quality only as a basis for standards that are more stringent than the technology-based effluent limitations. See, e.g., 33 U.S.C. §§ 1311 (b) (1) (C), 1312, 1313, 1316 (c).



We recognize, however, that elements of the environment apart from receiving water may be affected by enforcement of the effluent limitations, and in an appropriate case, these elements might warrant a variance.<sup>31</sup>

#### IV. Deadline

The industrial petitioners next argue that because the standards for the coal industry were promulgated barely two months before the statutory deadline for application of the best practicable control technology, they are in part unachievable, and therefore invalid, as to certain facilities. The petitioners suggest that the July 1, 1977, deadline for compliance with effluent limitations<sup>32</sup> may not be enforced because the administrator did not promulgate final regulations until long after the Act required him to do so.<sup>33</sup>

Congress addressed this problem when it passed the 1977 amendments to the Act. Section 309(a) (5) (B),<sup>34</sup> added by those amendments, authorizes the

<sup>31</sup> In *In re Louisiana-Pacific Corp.*, 10 E.R.C. at 1853 n.30, the administrator observed: "There is no reason why, in a proper case, a fundamental difference in non-water quality environmental impact could not justify a variance." See 33 U.S.C. § 1314(b) (1) (B).

<sup>32</sup> See § 301(b) (1) (A) [33 U.S.C. § 1311(b) (1) (A)].

<sup>33</sup> See § 304(b) [33 U.S.C. § 1314(b)]; but see *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 705-06 (D.C. Cir. 1975).

<sup>34</sup> 33 U.S.C. § 1319(a) (5) (B). As explained in the Senate committee report:

[t]he extension would be available only when the Administrator determines that the discharger acted in good

administrator to extend the deadline up to April 1, 1979, for companies that, despite good faith efforts to comply with the best practicable control technology standards, were unable to do so by July 1977. This new provision speaks in general terms of persons who have violated the Act or who otherwise have not complied with its requirements. It does not specifically mention compliance problems caused by the administrator's delay in promulgating effluent limitations guidelines. Nevertheless, the legislative history establishes that the amendment is intended to afford relief in such situations to companies that satisfy its requirements.<sup>35</sup>

Industry also contends that an extension pursuant to § 309(a) (5) (B) will not prevent suits by private citizens pursuant to § 505 of the Act<sup>36</sup> against com-

faith; that a serious commitment to achieve compliance had been made by the discharger; that compliance would occur no later than January 1, 1979; that the extension would not result in other sources having to achieve additional controls; that the application for a permit was filed prior to December 31, 1974; and that the necessary facilities for abatement are under construction.

S. Rep. No. 95-370 on S. 1952, 95th Cong., 1st Sess. 61, 1977 U.S. Code Cong. & Admin. News 4386.

<sup>35</sup> See 123 Cong. Rec. S19650 (daily ed., Dec. 15, 1977) (remarks of Sen. Muskie, the chairman of the drafting subcommittee); S. Rep. No. 95-370 on S. 1952, 95th Cong., 1st Sess. 61-62, 1977 U.S. Code Cong. & Admin. News 4385-4387; *Monongahela Power Co. v. EPA*, — F.2d —, 12 E.R.C. 1440 (4th Cir., Nov. 8, 1978); *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (6th Cir. 1978); cf. *State Water Control Board v. Train*, 559 F.2d 921, 927-28 (4th Cir. 1977).

<sup>36</sup> 33 U.S.C. § 1365.

panies that are unable to meet the statutory deadline. The courts, however, retain equitable discretion to determine whether and to what extent sanctions should be allowed against coal operators who qualify for relief under the amendment.<sup>37</sup>

Congress has adequately dealt with any dilemma that may confront a coal operator due to the agency's delay. Accordingly, the regulations are not invalidated by the short lead time.

### V. Western Coal Mines

The industrial petitioners next challenge the administrator's decision to exclude mines in six western states from the coverage of the maximum total suspended solids level applicable to mine drainage. Concerned that the administrator will promulgate more stringent standards for the western mines, the petitioners emphasize two assignments of error. First, they assert that the postponement of suspended solids limitations for the western mines violates the Act's requirement of uniformity in effluent limitations. Second, they point out that the limits for suspended solids, as proposed in 1976, applied to all mines in the country. They assert that they were not given adequate notice or opportunity to comment on the Agency's exclusion of these six states in its final regulations, in violation of the Administrative Procedure

<sup>37</sup> *State Water Control Board v. Train*, 559 F.2d 921, 927-28 (4th Cir. 1977); *accord*, *Weyerhaeuser Co. v. Costle*, 11 E.R.C. at 2185 n.86.

Act<sup>38</sup> and sections 101(e) and 304 of the Federal Water Pollution Control Act.<sup>39</sup>

The agency's interim effluent limitations guidelines, published October 17, 1975,<sup>40</sup> and May 13, 1976,<sup>41</sup> dealt with total suspended solids on a national, rather than regional, basis. The interim guidelines prescribed a maximum limitation for any one day of 70 milligrams of total suspended solids per liter of water (mg/l) and a maximum average daily value for 30 consecutive days of 35 mg/l. The final regulations, promulgated April 26, 1977, retain these values, but provide that the national suspended solids limitations do not apply in Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. In these states, the agency ruled, total suspended solids limitations will be determined on a case-by-case basis.<sup>42</sup> In the preamble to its final regulations, published April 26, 1977,<sup>43</sup> the agency explained its reasons for excluding these western states as follows:

*Western Coal Mines.* The Effluent Guidelines Division of EPA has received a substantial body of information from EPA Region VIII (located

<sup>38</sup> 5 U.S.C. § 553.

<sup>39</sup> 33 U.S.C. §§ 1251(e), 1314.

<sup>40</sup> 40 Fed. Reg. 48830.

<sup>41</sup> 41 Fed. Reg. 19832.

<sup>42</sup> 40 C.F.R. §§ 434.32(a) and 434.42(a) (footnote 1 to effluent limitations table).

<sup>43</sup> 42 Fed. Reg. 21382-21383.

in Denver, Colorado) with respect to the limitations on discharges from coal mines in the Western United States. Representatives of that Region believe more stringent numbers are appropriate in light of actual experiences with those mines. These data appear to support effluent limitations guidelines for a number of parameters significantly more stringent than the limitations announced today. The reasons for the apparent ability of Western coal mines to discharge pollutants in less concentration than is the case of Eastern coal mines are many, and certainly include the relatively more even topography of Western coal mines, the emphasis on recycle of relatively scarce water supplies, and the relatively lower concentration of pollutants in the geologic formations being exploited. The Agency is undertaking a thorough evaluation of the information being supplied from permit-granting authorities in the Western United States. It is anticipated that consideration will be given to proposal of a separate subcategory with respect to all pollutant parameters for those coal mining operations located in the Western United States which have attributes such that they are able to meet more stringent effluent limitations.

The Agency has determined not to promulgate national TSS limitations for mines in some Western States. Until national limitations guidelines are published which address Western mines and TSS, NPDES permit writers shall calculate TSS restrictions utilizing the same discretion and with the same deference to statutory factors as they have in the past.

We find no violation of the Act. In the first place, we note that the administrator has not exempted these mines from applying the best practicable technology to reach prescribed effluent limitations. Doing so would have violated the Act.<sup>44</sup> In contrast to outright exemption, the Act authorizes the administrator to create appropriate subcategories and to consider a broad range of factors when establishing the standards for facilities within such subcategories.<sup>45</sup> Thus, the Act does not prohibit the administrator from creating a subcategory based on geographic location if geological, topographical, or other technical factors justify it.

The administrator, however, has not utilized the Act to create a formal subcategory for the western mines. The issue therefore is whether the administrator has authority to take an interim step toward creating a subcategory by declining to apply the total suspended solid effluent limitations to a designated region pending further study.

While the resolution of the question is not free from doubt, we believe the administrator is empowered to defer establishment of the suspended solids limitation for mines in the western states. The information that the administrator received during the rulemaking proceedings indicated that, with the same

<sup>44</sup> Cf. *American Iron & Steel Institute v. EPA*, 568 F.2d 284, 294-95, 306-08 (3d Cir. 1977).

<sup>45</sup> See § 304(b)(1) [33 U.S.C. § 1314(b)(1)]; *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. at 131 n.21; *Weyerhaeuser Co. v. Costle*, 590 F.2d at 1053.

pollution control equipment, western mines could be operated with more stringent limitations on the discharge of suspended solids than the eastern mines. There is therefore no apparent technological justification for applying the limitations that were appropriate for the rest of the country.

At the same time, the agency had not received and studied sufficient data to create a separate subcategory with specific limitations. Consequently, the administrator applied to the western mines all national criteria except the single limitation for which he lacked sufficient data. He then temporarily authorized state and federal officials to set levels of suspended solid effluents on a case-by-case basis.<sup>46</sup> This practice will generally require the western mines to continue to conform to more strict suspended solids limitations than those for eastern mines during the administrator's study of the data.

Referring to an analogous issue concerning the same statute, Judge Leventhal cautioned courts to exercise restraint for reasons that are pertinent here:

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<sup>46</sup> Section 402(a) (1) of the Act [33 U.S.C. § 1342(a) (1)] gives the administrator the power to issue effluent limitations on a case-by-case basis "prior to the taking of necessary implementing actions relating to" requirements under §§ 301, 302, 307, 308, and 403 of the Act. Sections 402(b)-(c) [33 U.S.C. §§ 1342(b)-(c)] allow for issuance of permits on a case-by-case basis by state authorities, subject to veto by the administrator under § 402(d) (2) [33 U.S.C. § 1342(d) (2)]. A discharger is free to challenge the terms of a permit issued by the administrator, or the administrator's veto of a state-issued permit, in a court of appeals. 33 U.S.C. §§ 1369(b) (1) (D)-(F).

The courts cannot responsibly mandate flat guideline deadlines when the Administrator demonstrates that additional time is necessary to insure that the guidelines are rooted in an understanding of the relative merits of available control technologies. The delay required to give meaningful consideration to the technical intricacies of promising control mechanisms may well speed achievement of the goal of pollution abatement by obviating the need for time-consuming corrective measures at a later date.<sup>47</sup>

A regulatory agency frequently needs to address problems step by step. It should not always be required to answer every question simultaneously.<sup>48</sup> The administrator's deferral of limitations for suspended solids in the west pending further study was prudent and lawful.

The petitioners also point out that the limits on suspended solids, when initially promulgated in the notice of rulemaking, applied to all mines, and they protest that they were not given adequate opportunity to comment on the agency's exclusion of the western mines in its final regulations. They argue that this omission violated the notice and comment provisions of the Administrative Procedure Act<sup>49</sup> and the requirement of public participation found in the Federal Water Pollution Control Act.<sup>50</sup>

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<sup>47</sup> *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d at 712.

<sup>48</sup> See *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d at 705-12.

<sup>49</sup> 5 U.S.C. § 553.

<sup>50</sup> §§ 101(e), 304 [33 U.S.C. § 1251(e), 1314].



A notice of proposed rulemaking “‘must be sufficient to fairly apprise interested parties of the issue involved . . .’ but it need not specify ‘every precise proposal which [the agency] may ultimately adopt as a rule.’”<sup>51</sup> Moreover, “[t]he requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions.”<sup>52</sup>

Tested by these familiar principles, the administrator’s procedure fully complied with both statutes.<sup>53</sup> The Federal Water Pollution Control Act placed the industrial petitioners on notice that individual discharge permits might contain suspended solids standards that were more stringent than the national limitations.<sup>54</sup> The administrator’s 1975 notice of in-

<sup>51</sup> *Action for Children’s Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977).

<sup>52</sup> *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

<sup>53</sup> See notes 49 and 50, *supra*.

<sup>54</sup> Section 301(b) (1) (C) of the Act [33 U.S.C. § 1311(b) (1) (C)] requires the agency to enforce

any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510 [33 U.S.C. § 1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

Section 304(a) (4) [33 U.S.C. § 1314(a) (4)] makes suspended solids a mandatory element of pollution control standards.

terim rulemaking advised that effluent limitations would take account of total suspended solids; that the agency had considered geographic locations during its study of effluents; that the quality of raw water discharged from coal mining activities varies significantly; and that regional geology may be a determinant of the variations.<sup>55</sup> Therefore, it is apparent that the administrator’s deferral of a limitation for suspended solids for the western mines pending further study dealt with problems that were mentioned in the notice. Moreover, the final regulations did not require the western mines to cease the discharge of any pollutant other than those mentioned in the notice. In this respect the administrator’s action differs from procedures that were criticized in cases on which the petitioners rely.<sup>56</sup>

For all of these reasons, we conclude that the exclusion of the mines in the western states does not invalidate the suspended solids limitation.

## VI. Coal Preparation Plants

The industrial petitioners’ final complain concerns the regulations dealing with coal preparation plants and associated areas. They claim that these regulations are impermissibly vague; that they fail to distinguish between point sources and non-point sources;

<sup>55</sup> 40 Fed. Reg. 48831 (Oct. 17, 1975).

<sup>56</sup> See, e.g., *American Frozen Food Institute v. Train*, 539 F.2d 107, 135 (D.C. Cir. 1976); *Maryland v. EPA*, 530 F.2d 215, 222 (4th Cir. 1975), *vacated and remanded on other grounds*, 431 U.S. 99 (1977).

and that they do not adequately notify mining companies which of their activities are covered.

The Act restricts the administrator's authority to the regulation of discharges from point sources.<sup>57</sup> Non-point sources are subject only to analysis, study, and publication of information.<sup>58</sup> The Act defines a point source as follows:

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, [or] rolling stock . . . from which pollutants are or may be discharged.<sup>59</sup>

This definition excludes unchanneled and uncollected surface waters.<sup>60</sup>

The regulations under attack establish the concentration of specific pollutants "which may be discharged by a point source" <sup>61</sup> after application of best practicable control technology. They define a point source in conformity with the statute.<sup>62</sup> Their definitions of coal preparation plant and coal preparation plant associated areas are as follows:

<sup>57</sup> §§ 301(e), 304(b) [33 U.S.C. §§ 1311(e), 1314(b)]; *Appalachian Power*, 545 F.2d at 1373.

<sup>58</sup> See § 304(f) [33 U.S.C. § 1314(f)].

<sup>59</sup> § 502(14) [33 U.S.C. § 1362(14)].

<sup>60</sup> *Appalachian Power*, 545 F.2d at 1373.

<sup>61</sup> 40 C.F.R. §§ 434.22(a)-(b).

<sup>62</sup> 40 C.F.R. § 401.11(d) (general definition, incorporated in these regulations by § 401.10).

The term "coal preparation plant" means a facility where coal is crushed, screened, sized, cleaned, dried, or otherwise prepared and loaded for transit to a consuming facility.<sup>63</sup>

The term "coal preparation plant associated areas" means the coal preparation plant yards, immediate access roads, slurry ponds, drainage ponds, coal refuse piles, and coal storage piles and facilities.<sup>64</sup>

The subsection which the petitioners criticize as vague provides:

The provisions of this subpart are applicable to discharges from coal preparation plants and associated areas, including discharges which are pumped, siphoned or drained from coal storage, refuse storage and coal preparation plant ancillary areas related to the cleaning or beneficiation of coal of any rank including but not limited to bituminous, lignite and anthracite.<sup>65</sup>

The petitioners argue that this regulation could be interpreted to apply to surface runoff that does not fit within the statutory definition of a point source.

We do not share the petitioners' concern. The subsection about which the petitioners particularly complain, read in context with other pertinent parts of the regulations,<sup>66</sup> applies only to discharges from

<sup>63</sup> 40 C.F.R. § 434.11(e).

<sup>64</sup> 40 C.F.R. § 434.11(f).

<sup>65</sup> 40 C.F.R. § 434.20.

<sup>66</sup> See n.61, *supra*, and accompanying text.

point sources. Stripped to its bare bones, the petitioners' complaint is directed at the statutory definition of a point source, which the agency is powerless to change. How the agency will apply its regulations to actual situations presents issues which cannot be satisfactorily resolved in the absence of a full factual background.<sup>67</sup> They can only be determined through the permit-issuing process, including the administrative and judicial review that is available to the petitioners.

We find no defect in the regulations for coal preparation plants and associated areas.

## VII. Post-Mining Discharges

The Commonwealth of Pennsylvania and several citizens' environmental associations<sup>68</sup> petition for review of the administrator's exclusion of point source discharges from inactive surface mines during reclamation and revegetation and from underground mines after coal production ceases. These petitioners charge that the administrator's decision to exclude these aspects of the coal industry was arbitrary and capricious, and therefore illegal. They emphasize that the deadline imposed by Congress passed without the promulgation of any regulations for these

<sup>67</sup> See *Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 159, 163-66 (1967).

<sup>68</sup> Save our Cumberland Mountains, Inc.; Citizens League to Protect the Surface Rights, Inc.; West Virginia Citizen Action Group, Inc.; Mountain Community Union, Inc.; and Save our Mountains, Inc.

discharges. Pennsylvania additionally complains that the absence, or even the postponement, or rules pertaining to post-mining discharges will hinder its regulation of inactive mines by encouraging the industry to concentrate its operations in states with lower environmental standards.

The administrator, supported on this occasion by the industrial petitioners, claims that he has insufficient data, particularly on costs in relation to benefits, to draft the necessary regulations. Pennsylvania and the environmental groups insist, however, that one of the agency's development documents,<sup>69</sup> the comments received by the agency during rulemaking,<sup>70</sup> and the laws and regulations of several states<sup>71</sup> disclose sufficient data for the promulgation of pertinent regulations.

The record amply supports the petitioners' claim that post-mining pollution abatement is an integral part of coal production. In two sections of the Act, Congress explicitly recognized the problem of pol-

<sup>69</sup> EPA, Development Document for Interim Final Effluent Limitations Guidelines and New Source Performance Standards for the Coal Mining Point Source Category (May 1976).

<sup>70</sup> See, e.g., 42 Fed. Reg. 21383 (April 26, 1977).

<sup>71</sup> See, e.g., Ky. Rev. Stat. Chapter 350 (1978 Cum. Supp.); 35 Penna. Stat. § 691.1 et seq. (1978 Supp.); Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977). Also, according to EPA, the State of West Virginia has consistently certified that mines must continue to meet effluent limitations after release of the reclamation bond.

luted drainage from abandoned mines.<sup>72</sup> Coal mining, whether on the surface or underground, necessitates massive excavations that change the drainage characteristics of the land. Drainage of precipitation and surface water over coal waste—rather than water actually used for coal mining—causes the bulk of the water pollution from coal mines.<sup>73</sup> Ceasing active mining operations does not necessarily reduce water pollution from the site. Pollution may continue indefinitely or even increase in intensity if proper mining methods and control technology are not employed.<sup>74</sup> Pollution from post-mining sites may come from point source discharges.<sup>75</sup>

Much of our discussion in Part V about the western coal mines is pertinent to this issue. The administrator cannot exempt post-mining point source discharges from the application of the best practicable control technology. Section 301(e) of the Act requires that pertinent effluent limitations must be applied to all point sources without exception.<sup>76</sup> The

<sup>72</sup> §§ 107 and 304(f)(2)(B) [33 U.S.C. §§ 1257 and 1314 (f)(2)(B)] Both sections, however, provide only for study, analysis, and demonstration projects.

<sup>73</sup> Unlike coal preparation plants and plants in certain manufacturing industries coal mining does not use water as part of the process, except in small quantities for dust control and fire prevention. Appendix B to final regulations, 42 Fed. Reg. 21387 April 26, 1977.)

<sup>74</sup> See 42 Fed. Reg. 21387 (April 26, 1977).

<sup>75</sup> See 42 Fed. Reg. 21383, 21387 (April 26, 1977).

<sup>76</sup> 33 U.S.C. § 1311(e); see *American Iron and Steel Institute v. EPA*, 568 F.2d 284, 306-08 (3d Cir. 1977).

administrator may, however, subcategorize the coal industry for the purpose of prescribing effluent limitation guidelines under § 304(b)<sup>77</sup>

Here, the administrator has created a subcategory for active mines. He accomplished this by defining a coal mine as “an active mining area.”<sup>78</sup> This phrase was defined in turn as follows:

[A] place where work or other activity related to the extraction, removal, or recovery of coal is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun.<sup>79</sup>

To eliminate any question about the exclusion of post-mining operations the regulations also provide:

Drainage which is not from an active mining area shall not be required to meet [these] limitations . . . as long as such drainage is not commingled with untreated mine drainage which is subject to the limitations . . .<sup>80</sup>

The administrator rightly decided that regulations for active mines might prove to be inappropriate for inactive mines. Indeed, Congress has demonstrated its belief that inactive mines require pollution controls that are quite different from those for active mines. By enacting the Surface Mining Control and

<sup>77</sup> See text and cases cited at n.45, *supra*.

<sup>78</sup> 40 C.F.R. § 434.11(d).

<sup>79</sup> 40 C.F.R. § 434.11(b).

<sup>80</sup> 40 C.F.R. §§ 434.32(c), 434.42(c).



Reclamation Act of 1977,<sup>81</sup> Congress recognized that the Federal Water Pollution Control Act is inadequate to eliminate pollution from inactive mines. The surface mining act addresses many of the issues raised by the environmental groups and Pennsylvania. It requires a surface mine operator to restore vegetation, prevent erosion, and curtail water pollution after active mining has ceased.<sup>82</sup> It also requires underground mine operators to take specified measures during and after mining to reduce water pollution.<sup>83</sup>

Since we have concluded that the administrator acted properly in treating active mines as a subcategory that excluded inactive mines, the remaining issue becomes quite narrow. It is whether, in view of the administrator's failure to meet the deadline for promulgating regulations dealing with post-mining discharges, we should remand the regulations for prompt inclusion of inactive mines. The administrative record establishes that techniques for reducing pollution from inactive mines are generally known in the industry and that they are successfully utilized by some mining companies. The record, however, does not disclose data concerning the "total cost of application of technology in relation to the effluent reduction benefits to be received from such applica-

<sup>81</sup> Act of August 3, 1977, Pub. L. 95-87, 91 Stat. 447, codified as 30 U.S.C. §§ 1201-1328.

<sup>82</sup> § 515 of the surface mining act [30 U.S.C. § 1265].

<sup>83</sup> § 516 of the surface mining act [30 U.S.C. § 1266].

tion." The agency must consider this information in assessing the best practicable control technology currently available.<sup>84</sup>

The passage of the Surface Mining Control and Reclamation Act of 1977 also must be taken into account in determining whether the administrator acted arbitrarily by deferring regulation of post-mining discharges. That statute does not supersede or modify the Federal Water Control Pollution Act;<sup>85</sup> therefore, the administrator remains responsible for promulgating regulations concerning effluent limitations for point source discharges from post-mining areas in accordance with §§ 301 and 304 of the water pollution control act.<sup>86</sup> But the surface mining act requires the Environmental Protection Agency to cooperate "[t]o the greatest extent practicable" with the Secretary of the Interior.<sup>87</sup> Conversely, the Secretary is also required to cooperate with the agency.<sup>88</sup> The purpose of this cooperation is "to minimize duplication of inspections, enforcement, and administration."<sup>89</sup> We therefore conclude that the administrator

<sup>84</sup> § 304(b)(1)(B) of the water pollution control act [33 U.S.C. § 1314(b)(1)(B)]; *see* FMC Corp. v. Train, 539 F.2d at 978-79.

<sup>85</sup> § 702(a)(3) of the surface mining act [30 U.S.C. § 1292(a)(3)]

<sup>86</sup> 33 U.S.C. §§ 1311, 1314.

<sup>87</sup> § 702(c) of the surface mining act [30 U.S.C. § 1292(c)].

<sup>88</sup> § 201(c)(12) of the surface mining act [30 U.S.C. § 1211(c)(12)]

<sup>89</sup> *Id.*

responsibly decided to gather further data before issuing the regulations that must be consistent with the Secretary's enforcement and administration of the surface mining act.<sup>90</sup>

A third factor bearing on the propriety of the administrator's exclusion of post-mining discharges is the extent to which this aspect of the industry is regulated without his direct intervention. Even in the absence of national standards, the administrator may issue permits on a case-by-case basis for post-mining discharges.<sup>91</sup> Moreover, since there are no national standards for post-mining point source discharges, effluent limitations certified by a state must be incorporated in a discharge permit.<sup>92</sup>

A suit to challenge the administrator's action on the basis of information not in the record, or for the imposition of a judicial deadline for the promulgation

<sup>90</sup> After the administrator issued the regulations applicable to active coal mines, the Secretary of the Interior promulgated interim final regulations to implement the surface mining act. See 30 C.F.R. Part 77 (1977). The administrator concurred in these regulations. 42 Fed. Reg. 62639 (Dec. 13, 1977). The regulations are presently under review. In re Surface Mining Regulation Litigation, — F.Supp. —, 11 E.R.C. 2078 (D.D.C., Aug. 24, 1978), *appeal docketed*, No. 78-2190 (D.C. Cir., Nov. 20, 1978); see also In re Surface Mining Regulation Litigation, 452 F.Supp. 327 (D.D.C. 1978), *aff'd mem.*, No. 78-1406 (D.C. Cir., May 25, 1978).

<sup>91</sup> § 402(a) (1) [33 U.S.C. § 1342(a) (1)].

<sup>92</sup> See §§ 301(b) (1) (C), 401 510 [33 U.S.C. §§ 1311(b) (1) (C), 1341, 1370]; United States Steel Corp. v. Train, 556 F.2d 822, 835 (7th Cir. 1977).

of post-mining regulations, would more appropriately be brought in a district court where matters not disclosed by the administrative record could be offered in evidence.<sup>93</sup> We hold only, on the record presented in these petitions for review, that the final regulations are not invalidated by the absence of provisions dealing with post-mining discharges.

### VIII. Catastrophic Rainfall Exemption

The citizen environmental petitioners and Pennsylvania challenge a provision, contained in §§ 434.22 (c), 434.32(b), and 434.42(b) of the regulations, which is intended to allow overflow of untreated water from pollution control facilities in extraordinary circumstances. At the time these cases were briefed and argued, the regulations provided as follows:

Any untreated overflow, increase in volume of a point source discharge, or discharge from a by-

<sup>93</sup> Section 505 [33 U.S.C. § 1365] allows any citizen, after giving the administrator sixty day's notice, to "commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." The same provision gives the district courts original jurisdiction over such suits, without regard to the amount in controversy or the citizenship of the parties. See, e.g., Central Hudson Gas & Electric Corp. v. EPA, 587 F.2d 549, 555-57 (2d Cir. 1978); Environmental Defense Fund v. EPA, — F.2d —, 12 E.R.C. 1353, 1375-76 (D.C. Cir., Nov. 3, 1978); Natural Resources Defense Council, Inc., v. Train, 510 F.2d 692, 698-703 (D.C. Cir. 1975); cf. Currie, Judicial Review under Federal Pollution Laws, 62 Iowa L. Rev. 1221, 1249-50 (1977).

pass system from facilities designed, constructed, and maintained to contain or treat the discharges from the facilities and areas covered by this subpart which would result from a 10-year 24-hour precipitation event, shall not be subject to the limitations set forth in paragraph (a) of this section.

This means that after a storm or other natural event that forces an overflow from a facility designed, constructed, and maintained to contain a 10-year 24-hour precipitation event,<sup>94</sup> the overflow will be permitted.<sup>95</sup> The record discloses that this provision is similar in many respects to safety standards previously promulgated by the Department of the Interior for water impoundment facilities at existing coal mines.<sup>96</sup>

<sup>94</sup> "10-year 24-hour precipitation event" is an engineering term. It is a rainfall figure, taken from National Weather Service charts for the relevant geographic area, which indicates the heaviest 24-hour precipitation that can be expected to fall in a decade. 40 C.F.R. § 434.11(h) (1977). The possible use of this criterion as a basis for an overflow exemption was recognized during legislative debate on the Act. Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 1298 (1973).

<sup>95</sup> EPA summary of final regulations, 42 Fed. Reg. 21381 (April 26, 1977).

<sup>96</sup> See Mandatory Safety Standards, Surface Coal Mines and Surface Work Areas of Underground Coal Mines, 30 C.F.R. 77.216 through 77.216-5 (1977) (promulgated by the Mine Enforcement and Safety Administration). The administrator took note of these regulations. 42 Fed. Reg. 21381-21382 (April 26, 1977).

The petitioners do not dispute the necessity for a catastrophic rainfall exemption, nor do they question a criterion of the heaviest 24-hour precipitation that can be expected to fall in a decade. Their principal complaint is that the administrator arbitrarily and capriciously based the exemption on the design, construction, and maintenance of the pollution control facilities rather than on the magnitude of actual precipitation. They prefer the regulation to specify that the exemption will apply only when the 10-year 24-hour rainfall actually occurs. They point out that in the catastrophic rainfall regulations applicable to other industries, the agency has used the criterion of actual performance, rather than design, construction, and maintenance.<sup>97</sup>

After oral argument of these cases, the administrator promulgated final regulations clarifying 40 C.F.R. §§ 434.22(c), 434.32(b), and 434.42(b). These provisions now expressly allow only discharges from properly designed and constructed facilities that "result[] from a 10 year/24 hour or larger precipitation event or from a snow melt of equivalent volume."<sup>98</sup>

We consider the law in effect at the time we render our decision. See *Thorpe v. Housing Authority of the*

<sup>97</sup> See, e.g., 40 C.F.R. §§ 415.22(b) (aluminum sulfate production) and 421.42(b) (primary copper smelting) (1977). These regulations allow an exemption for the 10-year 24-hour event only "when such event occurs."

<sup>98</sup> 40 C.F.R. §§ 434.25(b), 434.35(b), 434.45(b), promulgated in 44 Fed. Reg. 2590 (Jan. 12, 1979).

City of Durham, 393 U.S. 268, 281-83 (1969). EPA's change in the language of the exemption disposes of the criticism of Pennsylvania and the environmental petitioners.

The lack of provisions specifying the details of necessary design, construction, and maintenance does not invalidate the regulations. In all of the regulations under review, the administrator has avoided dictating engineering specifications. Instead, he has properly concentrated on prescribing limitations on the amount of pollutants that may be discharged regardless of the construction or treatment techniques that are employed. Using the 10-year 24-hour engineering standard without detailed specifications for impoundment facilities is consistent with this approach.<sup>99</sup>

The petitions to set aside the regulations are denied with the exception of the regulations dealing with variances, which are remanded to the agency for reconsideration.

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<sup>99</sup> Other regulatory agencies use this method of stating design storm criteria. These agencies include the Soil Conservation Service, the United States Bureau of Reclamation, the American Society of Civil Engineers, and the regulatory agencies of several states. See United States Department of the Interior, Mining Enforcement and Safety Administration, Engineering and Design Manual for Coal Refuse Disposal Facilities, page 6.57 n.1 and sources cited (1975).

## APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 76-1690

[Filed Jun. 25, 1979]

CONSOLIDATION COAL COMPANY, PETITIONER

*vs.*

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

---

ON PETITION FOR REVIEW OF AN ORDER OF THE  
ENVIRONMENTAL PROTECTION AGENCY

---

THIS CAUSE came on to be heard upon the petition of Consolidation Coal Company for review of an order issued by Administrator of the Environmental Protection Agency on May 3, 1976; and upon the certified record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the petitions to set aside the regulations are denied with the exception of the regulations dealing with variances, which are remanded to the Environmental Protection

Agency for reconsideration consistent with the opinion of this Court filed herewith.

/s/ William K. Slate, II  
WILLIAM K. SLATE, II  
Clerk

# APPENDIX E

Section 301 of the Clean Water Act, 33 U.S.C. (and Supp. I) 1311, provides in pertinent part:

(a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U.S.C. 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 U.S.C. 1314(b)] \* \* \*.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b) (2) of this Act [33 U.S.C. 1314 (b) (2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including infor-



mation developed pursuant to section 315 [33 U.S.C. 1325]), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 U.S.C. 1314(b)(2)] \* \* \*.

\* \* \* \* \*

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act [33 U.S.C. 1317(a)] which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act [33 U.S.C. 1314(a)(4)] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act [33 U.S.C. 1314(b)(4)]; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations

in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Section 304(b) of the Clean Water Act, 33 U.S.C. (and Supp. I) 1314(b), provides in pertinent part:

For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title [Oct. 18, 1972], regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

\* \* \* \* \*

(1)(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to

the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act [33 U.S.C. 1311(b)(1)] shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

\* \* \* \* \*

(2)(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act [33 U.S.C. 1311(b)(2)] to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

\* \* \* \* \*

(4)(B) specify factors to be taken into account in determining the best conventional pollutant con-

trol technology measures and practices to comply with section 301(b)(2)(E) of this Act [33 U.S.C. 1311(b)(2)(E)] to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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No. 79-770

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.

---

DOUGLAS M. COSTLE, ADMINISTRATOR,  
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CONSOLIDATION COAL COMPANY, ET AL.

---

MOTION TO DISPENSE WITH APPENDIX

---

Pursuant to Rule 36(8) of the Rules of this Court, the Solicitor General, on behalf of the federal petitioners, moves to dispense with the requirement of an appendix.

• On February 19, 1980, the Court granted the petition for a writ of certiorari in this case. The primary question raised

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---

MOTION TO DISPENSE WITH APPENDIX

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Pursuant to Rule 36(8) of the Rules of this Court, the Solicitor General, on behalf of the federal petitioners, moves to dispense with the requirement of an appendix.

• On February 19, 1980, the Court granted the petition for a writ of certiorari in this case. The primary question raised is whether regulations adopted by the Administrator of the Environmental Protection Agency in accordance with Section 301(b)(1) of the Clean Water Act, 33 U.S.C. 1311(b)(1), must include a variance provision that requires consideration of the economic ability of an individual discharger to afford the costs of the "best practicable control technology currently available." The case also presents a substantial ripeness question.

Various relevant documents are reprinted as appendices to the petition for a writ of certiorari (Pet. App. 1a-85a). After reviewing the record in this case, counsel for both petitioners and respondents have concluded that no other materials in the record will aid the Court in the resolution of the issues posed by this case. Accordingly, we request that the Court dispense with an appendix in this case. If the motion is granted, we will include "the relevant docket entries in the proceeding below" as an appendix to our brief on the merits. See Rule 36(1), Rules of the Supreme Court.

Respectfully submitted.

WADE H. McCREE, JR.  
Solicitor General

APRIL 1980



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

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No. 79-770

---

ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*

*v.*

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.,  
*Respondents.*

---

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

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**BRIEF IN OPPOSITION FOR THE  
NATIONAL CRUSHED STONE ASSOCIATION, ET AL.**

---

Respondents National Crushed Stone Association, et al., submit this brief in opposition to the petition of the Environmental Protection Agency. The grounds for our opposition are that the issues raised are not sufficiently important to warrant review by this Court, that the alleged conflict in the circuits is illusory, that

the decision below was fair and correct, and that the regulation at issue is invalid on grounds not contested by EPA.

We accept petitioner's statements as to the opinions below, jurisdiction, and the statute involved and thus will not repeat these.

### QUESTIONS PRESENTED

1. Whether the Court below properly held that EPA's variance clause for effluent limitations based upon application of the "best practicable control technology currently available" must provide for consideration of economic factors.

2. Whether EPA's variance clause is invalid on the additional ground that it fails properly to take into account the statutory factors set forth in Section 304 (b)(1)(B) of the Act, 33 U.S.C. § 1314(b)(1)(B).

3. Whether the Court below properly held that EPA's variance clause is ripe for review, since it presents a discrete legal issue that is capable of pre-enforcement review.

### STATEMENT OF THE CASE

The factual and legal setting in this case is more complex than indicated by petitioner. Accordingly, we wish to present an additional discussion of facts material to the questions presented for review.

The Clean Water Act contains a comprehensive scheme for the regulation of waste water discharges from point sources. Of concern here is the requirement in Section 301(b)(1)(A) of the Act (33 U.S.C. § 1311 (b)(1)(A)) that industrial dischargers achieve by July 1,

1977, effluent limits based upon the application of the "best practicable control technology currently available" (herein "BPT") as defined by EPA in guidelines published under Section 304(b)(1)(B) of the Act, 33 U.S.C. § 1314(b)(1)(B). The latter provision enumerates particular factors that must be taken into account by EPA in establishing the BPT effluent limitations guidelines.

The effluent limitations guidelines are not self-enforcing. Specific effluent limits for particular industrial facilities are established in National Pollutant Discharge Elimination System ("NPDES") permits issued under Section 402 of the Act, 33 U.S.C. § 1342.<sup>1</sup>

As EPA began implementing the 1972 Amendments to the Act,<sup>2</sup> a controversy developed as to the relationship between effluent limitations guidelines and effluent limits applicable to particular facilities. This dispute was resolved in this Court's decision in *duPont v. Train*, 430 U.S. 112 (1977). There this Court upheld EPA's authority to publish BPT effluent limitations by regulation "so long as some allowance is made for variations in individual plants." *Id.* at 128. The Court noted that EPA in the case before it had published a variance clause for the 1977 BPT limitations, but declined to consider at that stage "whether EPA's variance clause has the proper scope," as did the Court below (the Fourth Circuit) in that case. *Id.* at n.19.

The validity of EPA's variance clause was ruled upon by the Fourth Circuit shortly after its decision

<sup>1</sup> These permits set forth specific limits on the amounts of various substances that may permissibly be discharged. *See* EPA v. State Water Resources Control Board, 426 U.S. 200, 205 (1976).

<sup>2</sup> Pub. L. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 et seq.

in *duPont, supra*. In *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976) the Court found that the variance clause was ripe for review, and found it deficient. In particular, the Court held that EPA had "offered no reasoned explanation for limiting the variance clause to considerations of technical and engineering factors," and for failing to take into account factors such as energy requirements, adverse non-water quality environmental impact and costs. 545 F.2d at 1359. The Court accordingly remanded the case to EPA to "come forward with a meaningful variance clause . . . taking into consideration at least the statutory factors set out in §§ 301(c), 304(b)(1)(B) and 306(b)(1)(B)."<sup>3</sup> *Id.* at 1359-60

EPA certainly knew that the Court's decision in *Appalachian Power* would become final in the absence of a request that this Court review the matter; yet the Agency chose not to seek certiorari.

One year after the decision in *Appalachian Power, supra*, EPA published final BPT effluent limitations for the crushed stone and construction sand and gravel industries.<sup>4</sup> These limitations were accompanied by the same variance clause that the Court had found invalid in *Appalachian Power*.<sup>5</sup> The National Crushed Stone Association and two individual companies jointly sought review of these regulations. In a decision announced on June 18, 1979, the Fourth Circuit unanimously held invalid the substantive effluent limitations,

<sup>3</sup> The reference to § 306(b)(1)(B) is to a variance for new sources, which is not involved here.

<sup>4</sup> 42 Fed.Reg. 35,843-852 (1977); 40 C.F.R. §§ 436.20-436.32 (1977).

<sup>5</sup> 40 C.F.R. §§ 436.22, 436.32 (1977).

and EPA does not challenge that aspect of the decision below.<sup>6</sup> The Court also held that the variance clause was defective under its prior decision, and accordingly "remand[ed] the variance provisions to the Agency for compliance with *Appalachian Power Company*." *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111, 124 (4th Cir. 1979).

EPA subsequently sought a stay of the mandate of the Fourth Circuit pending its application for a writ of certiorari. The Fourth Circuit denied EPA's request. The variance clause is now before EPA, on remand, and to date the Agency has not announced how it will proceed.

## REASONS FOR DENYING THE WRIT

### 1. The Variance Clause Is Invalid On Grounds Not Challenged By EPA

EPA has asked this Court to review only the issue of whether the Court below improperly concluded that the variance clause must provide for the consideration of certain economic factors. The significance of this issue is diminished by the fact that the Court below held the variance clause invalid on other grounds not challenged by EPA.

In its briefs before the Fourth Circuit, the National Crushed Stone Association argued that EPA's variance clause failed to take into account these site-specific factors, such as land unavailability and non-water quality impacts, even though the Agency in its brief admitted that they were relevant.<sup>7</sup> Section 304(b)(1)(B)

<sup>6</sup> See EPA Petition at 10.

<sup>7</sup> See the Association's Br. below at 52-56 and Reply Br. at 26-28; EPA's Br. below at 35, 55-56 and n. 44. Crushed stone



of the Act clearly requires that such factors be taken into account in establishing effluent limitations guidelines.<sup>8</sup>

The Fourth Circuit in *Appalachian Power* did not limit its remand to economic aspects of the variance clause, and also held that EPA had "offered no reasoned explanation" for failing to consider other factors such as adverse non-water quality environmental impact \* \* \* [and] energy requirements." 545 F.2d at 1359. In the decision below, the Court remanded the variance clause to EPA "for compliance with *Appalachian Power Company*," noting that the industry's argument did not emphasize the economic factors but "largely is devoted to other specific factors they claim should be considered in determining whether or not to grant a variance." (*Id.* at 124). Thus the variance clause was held invalid by the Court below on grounds far broader than the economic issues raised here by EPA.

## 2. The Conflict Alleged By EPA Is Illusory

The heart of EPA's petition lies in its allegation that there is a conflict between the Fourth and District of Columbia Circuits as to the validity of the variance

and construction sand and gravel mining and processing plants operate in virtually every region of the country, and are subject to varying climatic, hydrological, topological and geologic conditions. These varying conditions affect the volume and constituents of waste water discharges and also the feasibility of treatment.

\* This provision expressly requires EPA to take into account "the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements) and such other factors as the Administrator deems appropriate." 33 U.S.C. § 1314(b)(1)(B).

clause and its consideration of economic factors. This contention will not withstand scrutiny.

Part of the difficulty on this score lies in EPA's confusion of two issues, namely (1) whether the variance clause must make some provision for consideration of economic factors, and (2) whether the variance clause must specifically require the consideration of the economic ability of an individual discharger of pollutants to afford the costs of such technology, or "affordability." EPA has also misstated the holding of the Court below.

As to the former, it is significant that EPA's position before the Fourth Circuit initially was that economic factors could not be considered at all in granting a variance request. See *Appalachian Power*, *supra*, 545 F.2d at 1359-60, n. 22.<sup>9</sup> Based on the language and history of the Act, the Court in that case had no difficulty in rejecting that position. In *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978), the Court similarly held that "the 'total cost' of pollution control at the petitioning mill must be considered under a satisfactory variance provision." *Id.* at 1036. Thus there is no conflict between the two appellate courts on the appropriateness of considering an individual plant's costs in a variance proceeding. EPA's petition now concedes that such costs may be considered (EPA Petition at 7-8), however the variance clause at issue here does not so provide.

To support its claimed conflict, EPA sidesteps this issue and argues that the D. C. Circuit in *Weyerhaeuser*, contrary to the Fourth Circuit, further held

<sup>9</sup> See also *Weyerhaeuser Co. v. Costle*, 590 F.2d at 1011, 1038 (D.C. Cir. 1978).

that plant-specific economic capability (or affordability) alone is not grounds for a BPT variance.<sup>10</sup> The difficulty with this argument is that the Fourth Circuit expressly stated that this was *not* its holding, and rejected EPA's contrary suggestions calling them "*no better than straw men.*"<sup>11</sup> Further, the Court below specifically addressed EPA's claimed conflict in the circuits and stated that its "construction of the variance provisions seems generally, if not precisely in accord with that of the Court in *Weyerhaeuser Co. v. Costle.*"<sup>12</sup> The absence of a square conflict is evident from a careful reading of the two decisions. Both Courts have held that the Agency must give permittees the ability to secure variances from the 1977 limitations analogous to their ability to secure variances from the 1983 standards. See *Weyerhaeuser, supra*, 590 F.2d at 1034; *National Crushed Stone Association, supra*, 601 F.2d at 123-24. These decisions are consistent with this Court's holding in *duPont, supra*, that it would be "highly anomalous" to read the Act to allow a different pattern of promulgation for the 1977 regulations than clearly set forth for the 1983 regulations. *duPont, supra*, 430 U.S. at 127-28.

<sup>10</sup> EPA Petition at 13-14.

<sup>11</sup> 601 F.2d at 124. The Court reiterated its statement in *Appalachian Power* that a plant could obtain a variance "if it is doing all that the maximum use of technology within its economic capability will permit and if such use will result in reasonable further progress toward the elimination of pollutants" and if it complies with "any other requirements of the variance." *Id.*

<sup>12</sup> *Id.* (citation omitted). The D.C. Circuit similarly rejected a decision of the Tenth Circuit upholding EPA's variance provision, finding the Fourth Circuit's reasoning in *Appalachian Power* to be "more persuasive." *Weyerhaeuser, supra*, 590 F.2d at 1036, n.35.

### 3. The Issues Raised Are Not Sufficiently Important To Warrant Review By This Court

Despite EPA's weak protests to the contrary, this case can hardly be claimed to be one deserving of review by this Court.

In the first place, the decision below at least in part reflected the particular facts of this case. EPA's development document for mineral mining had recommended the *same* effluent limits be established for the 1977 BPT and the 1983 BAT requirements. EPA had acknowledged that economic affordability could be grounds for a variance from the BAT limits. "This situation could easily close a plant in 1979 which [under the 1977 BPT standards] would be allowed to operate under a variance in 1983," a result that the Court below found could not have been intended by Congress. 601 F.2d at 124.

Secondly, EPA's contention that the variance clause threatens the Congressional goal of eliminating water pollution must be rejected out of hand. The decision below expressly held that BPT variance must "result in reasonable further progress toward the elimination of the discharge of pollutants." 601 F.2d at 124.

Finally, the decision below is of limited applicability. It applies directly only to the crushed stone and construction sand and gravel industries, and has also been applied by the Fourth Circuit to the coal mining industry. The limited nature of this ruling is underscored by the judicial review provisions of the Act, which provide that EPA effluent limitations may be challenged only by the filing of a petition for review within 90 days of promulgation of the regulations in

question.<sup>13</sup> EPA recites that there are BPT variance clauses in 38 other industries for which BPT regulations have been promulgated for some time, but does not suggest that any of these variance clauses (for which the 90-day period has passed) could now be subject to judicial review.<sup>14</sup> These considerations also warrant rejection of EPA's suggestion that there is a ripeness issue here, an argument that is apparently not strongly advanced.<sup>15</sup>

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<sup>13</sup> 33 U.S.C. § 1369(b)(1).

<sup>14</sup> Apparently EPA also is of the view that somehow the decision below will apply to EPA's BAT variance clause, because the BPT standards are a minimum or "floor" below which a BAT variance may not be granted, and it may be argued that the BPT variance must be considered in determining that floor. This issue was neither argued to nor addressed by the Court below. Moreover, if anything, this point underscores the correctness of the Fourth Circuit's comments as to the relationship between the BPT and BAT variances.

<sup>15</sup> EPA's petition (at 21) acknowledges that the Agency's position "presents a discrete legal issue that is capable of pre-enforcement renew." Both the D.C. Circuit and the Court below found the variance clause to be reviewable.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

\_\_\_\_\_  
 No. 79-770  
 \_\_\_\_\_

ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*

v.

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.,  
*Respondents.*

\_\_\_\_\_  
 DOUGLAS M. COSTLE, ADMINISTRATOR,  
 ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner,*

v.

CONSOLIDATION COAL COMPANY, ET AL.,  
*Respondents.*

\_\_\_\_\_  
 On Petition for a Writ of Certiorari to the United States  
 Court of Appeals for the Fourth Circuit

\_\_\_\_\_  
 OPPOSITION OF RESPONDENTS  
 CONSOLIDATION COAL COMPANY, ET AL.  
 \_\_\_\_\_

Respondents Consolidation Coal Company, *et al.*<sup>1</sup> oppose the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the Environmental Protection Agency (EPA) and its Administrator, to review portions of the opinions of the United States Court of Appeals for the Fourth Circuit in *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111 (4th Cir. 1979), and *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979).

## OPINIONS BELOW AND JURISDICTION

The opinions below are set forth in the Appendix to the Government's Petition. A statement concerning the Court's jurisdiction is set forth at page 2 of the Petition. We agree with that statement.

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether regulations promulgated by EPA establishing effluent limitations based upon application of "best practicable technology currently available" (BPT limitations) pursuant to section 301(b)(1)(A) of the Clean Water Act, 33 U.S.C. § 1311(b)(1)(A) (1976), must include variance provisions that allow consideration of whether the discharger is doing all that the maximum use of technology within its economic ability will permit and whether such use will result in reasonable further progress toward eliminating pollutant discharges?

2. Whether the Fourth Circuit's review of EPA's BPT variance for the crushed stone, construction sand and gravel and coal industries was premature?

<sup>1</sup> Consolidation Coal Company, Bethlehem Steel Corporation, National Coal Association, Peabody Coal Company, AMAX, Inc., Gibraltar Coal Corporation, The Drummond Company, North American Coal Corporation, National Steel Corporation, Republic Steel Corporation, United States Steel Corporation, Cedar Coal Company, Central Appalachian Coal Company, Central Coal Company, Central Ohio Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company.

## STATUTE INVOLVED

Pertinent portions of sections 301 and 304(b) of the Clean Water Act, 33 U.S.C. §§ 1311, 1314(b) (1976 and Supp. I, 1977), are set forth in Appendix E to the Government's Petition.

## PRELIMINARY STATEMENT

1. The Federal Water Pollution Control Act Amendments of 1972 (FWPCA), Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* (1976), made unlawful the discharge of pollutants into the nation's waters without a permit issued under section 402 of the FWPCA. *See* 33 U.S.C. §§ 1311(a), 1342 (1976).

Section 402(a) established the National Pollutant Discharge Elimination System (NPDES) and provides that any NPDES permit must require compliance with all applicable terms of section 301 of the FWPCA. 33 U.S.C. § 402(a) (1976). The relevant portion of section 301 states that "there shall be achieved . . . not later than July 1, 1977, effluent limitations for point sources . . . which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Title." 33 U.S.C. § 1311(b)(1)(A) (1976).<sup>2</sup>

Section 304(b) of the FWPCA in turn required EPA within one year of enactment to publish "regulations providing guidelines for effluent limitations" for existing point sources that were to be based upon consideration of several factors, including "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application. . . ." 33 U.S.C. §§ 1314(b), 1314(b)(1)(B) (1976).

<sup>2</sup> The term "point source" is defined at section 502(14) of the Act. 33 U.S.C. § 1362(14) (1976).

In addition to these BPT effluent limitations, the FWPCA also established a second stage of more stringent effluent limitations based on the "best available technology economically achievable" (BAT limitations). These BAT limitations originally were to be achieved by "categories and classes of point sources" by July 1, 1983. 33 U.S.C. § 1311(b)(2)(A) (1976).

The FWPCA was amended by the Clean Water Act of 1977 (CWA), Pub. L. No. 95-127, 91 Stat. 1566, 33 U.S.C. § 1311 *et seq.* (Supp. I, 1977), and by the Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467. Certain aspects of these amendments are pertinent to the issues raised in the Government's Petition. First, Congress extended the compliance date for achieving BAT effluent limitations. Amended section 301(b)(2)(C) now requires BAT limitations for toxic pollutants to be achieved by July 1, 1984. 33 U.S.C. § 1311(b)(2)(C) (Supp. I, 1977). For all other pollutants, BAT limitations must be achieved by existing dischargers sometime between July 1, 1984, and July 1, 1987, depending on the date EPA promulgates the limitations. 33 U.S.C. § 1311(b)(2)(F) (Supp. I, 1977). Second, a new class of pollutants subject to effluent limitations based on the "best conventional pollutant control technology" (BCT) was created. 33 U.S.C. § 1311(b)(2)(E) (Supp. I, 1977). These BCT limitations must be met by July 1, 1984. *Id.*

2. This Court first reviewed the requirements of the FWPCA in *EPA v. State Water Resources Control Board*, 426 U.S. 200 (1976), in which it stated that permits issued under section 402 of the Act serve "to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger." *Id.* at 205. It was not until its opinion in *duPont v. Train*, 430 U.S. 112 (1977), however, that the Court resolved the question of how these "generally applicable

effluent limitations" were to be developed. In *duPont*, the Court noted that BAT effluent limitations must be established as nationally uniform regulations "for categories and classes of point sources," but that the FWPCA was less clear on whether BPT limitations were to be set uniformly on the basis of categories or classes, or whether they must be set separately for each individual point source. *See id.* at 124-27. After reviewing the Act and its legislative history, the Court held that EPA was authorized to promulgate regulations establishing uniform BPT effluent limitations for categories of plants, but only "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations." *Id.* at 127-28 (footnote omitted).<sup>3</sup> The Court did not examine EPA's BPT variance clause in *duPont*. It merely agreed with the Fourth Circuit's decision below "that consideration of whether EPA's [BPT] variance provision has the proper scope would be premature." *Id.* at 128 n.19 (citing *duPont v. Train*, 541 F.2d 1018, 1028 (4th Cir. 1976)).

3. The Fourth Circuit's *Crushed Stone* opinion climaxed a rather lengthy debate between EPA and that court over the "proper scope" of the BPT variance. After summarizing its BPT variance holding in *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1358-60 (4th Cir. 1976), the court in *Crushed Stone* discussed EPA's response to that holding and traced the interpretations that EPA had given the BPT variance since this Court's *duPont* decision. 601 F.2d at 122-23. Based on this analysis, the Fourth Circuit rejected the Agency's claim that review of the validity of the variance provision was premature. *Id.* at 122-23. On the merits, the Fourth Cir-

<sup>3</sup> The Court also held that new source performance standards promulgated under FWPCA section 306, 33 U.S.C. 1316 (1976), may not contain any variance provisions. 430 U.S. at 137-39.

cuit held that the BPT variance contained in the effluent limitation guidelines regulations for the crushed stone, construction sand and gravel industry, as interpreted by EPA, was invalid because it failed, among other things, to allow consideration of the statutory factors set forth in section 301(c) of the Act. *Id.*

In holding EPA's variance provision invalid, the Fourth Circuit specifically rejected EPA's claim that the *Appalachian Power* decision meant that a plant may "secure a BPT variance by alleging [and proving] that the plant's own financial status is such that it cannot afford to comply with the National BPT limitation." *Crushed Stone*, 601 F.2d at 123. Instead, the Fourth Circuit held that EPA must establish a BPT variance which provides some consideration of the economic cost factors set out in section 301(c) of the CWA and that proper consideration of those factors in the context of a BPT variance request would require a determination whether the discharger "is doing all that the maximum use of technology within its economic capability will permit and [whether] such use will result in reasonable further progress toward the elimination of the discharge of pollutants." *Id.* at 123-24 (emphasis in original). Even this determination would not, however, necessarily entitle the requestor to a variance. It would be only one of a number of factors to be considered. *Id.*

In *Consolidation Coal* the Fourth Circuit summarily set aside a BPT variance provision identical to that at issue in *Crushed Stone*. 604 F.2d at 243-44.

4. The D.C. Circuit in *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978), addressed EPA's standard BPT variance in the context of its review of EPA's effluent limitations for the paper industry. See 590 F.2d at 1032. However, in contrast to the Fourth Circuit, the D.C. Circuit emphasized that its review of the variance

was "quite narrow." 590 F.2d at 1033. The court sought only to determine whether the BPT variance for the paper industry, "has a capacity for the degree of flexibility that *duPont* deemed crucial to the legality of any general set of industry-wide effluent limitations under the Act." 590 F.2d at 1033. The D. C. Circuit court cautioned that it was only conducting "a threshold review of the provision." 590 F.2d at 1032. It stated clearly that it was not rendering judgment on its "application in specific cases, or on its precise interpretation . . ." *Id.* at 1033 (emphasis added).

The D. C. Circuit then interpreted this Court's decision in *duPont* as requiring "[a]t minimum . . . that [EPA] must give permittees the ability to secure variances from the 1977 limitations analogous to their statutorily provided ability to secure the same with respect to the 1983 [BAT] standards." 590 F.2d at 1034 (footnote omitted). That court went on to hold, as the Fourth Circuit had previously, that "the 'total cost' of pollution control" in relation to "the effluent reduction benefits to be achieved" is a relevant consideration in a BPT variance decision. 590 F.2d at 1036 (emphasis in original). Based on the evidence before it, the D. C. Circuit then held that EPA's BPT variance for the pulp paper industry, was "capable of sufficient flexibility to buttress its claim of authority to limit 1977 effluent discharges by way of general regulations." 590 F.2d at 1040-41 (emphasis in the original).

#### REASONS FOR DENYING THE PETITION

The Government has asserted essentially four reasons why this Court should review the Fourth Circuit's BPT variance holdings in *Crushed Stone* and *Consolidation Coal*:

1. These decisions directly conflict with the D. C. Circuit's *Weyerhaeuser* decision;



2. This conflict involves an important federal question warranting this Court's immediate review because EPA will be unable to effectively and consistently administer its BPT variances for all industries until it is resolved, and because this Court will never again be able to review the BPT variances for the three industries affected by this alleged conflict;
3. The Fourth Circuit's BPT variance decisions would impede the statutory goal of eliminating water pollution; and
4. The Fourth Circuit's decisions are "wrong."

These contentions lack merit. The issues posed in the Government's Petition neither require nor support this Court's review of the Fourth Circuit's *Crushed Stone* and *Consolidation Coal* decisions.

A. *There is No Clear Conflict Between the Fourth and D.C. Circuits.* There is no irreconcilable conflict between the Fourth and D.C. Circuits on the BPT variance issue. On the contrary, the two circuits are in substantial agreement. First, both circuits agree that EPA's BPT variance must relate to BPT effluent limitations in a manner analogous to the relationship between section 301(c) and the 1984 BAT limitations. Compare 601 F.2d at 124 and 545 F.2d at 1359 with 590 F.2d at 1034. Second, both circuits agree that "total cost" in relation to pollution reduction benefits must be considered in any BPT variance. Compare 601 F.2d at 123-24 with 590 F.2d at 1036. Third, both circuits agree that this balancing of costs versus pollution reduction benefits is but one of several factors which EPA must consider when determining BPT variances. Compare 601 F.2d at 124 with 590 F.2d at 1036. The *Weyerhaeuser* court stated that "so long as those costs relative to the pollution reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in

fact the inability, of the operator to absorb the costs need not control the variance decision." 590 F.2d at 1036 (emphasis omitted from the original and added.) Similarly, the Fourth Circuit in *Crushed Stone* rejected the notion that a plant could obtain a variance simply because it could not "afford to comply with the national BPT limitation." 601 F.2d at 123. Instead, that court held that the discharger's economic capability, balanced against the maximum pollution reduction which it can and has achieved, may justify a BPT variance "'should [the discharger] comply with any other requirements of the variance.'" 601 F.2d at 124 (emphasis added).

Neither the Fourth nor D.C. Circuits perceived the sharp conflict claimed by the Government. The Fourth Circuit in *Crushed Stone* noted that "our construction of the variance provision seems to be generally, if not precisely, in accord" with that of the D.C. Circuit. 601 F.2d at 124. And the D.C. Circuit, having cited with approval the *Appalachian Power* decision, see 590 F.2d at 1036 n. 35, 1038, 1039 n. 38 stated simply that the Fourth Circuit's view of the variance "may be somewhat broader than ours." *Id.* at 1036 n. 35 (emphasis added).

Moreover, the D.C. Circuit has not yet issued a final decision on the validity of EPA's BPT variance for the paper industry. The *Weyerhaeuser* court explicitly and repeatedly pointed out that it was conducting only a "threshold review" of EPA's BPT variance for the pulp paper industry to determine whether that provision was "capable" of the requisite flexibility of application. The court expressly stated that it was not ruling on the "precise interpretation" to be given the variance. 590 F.2d at 1033.

Should any future BPT variance requests be filed by industries other than those involved in the *Crushed Stone*, *Consolidation Coal* and *Appalachian Power* decisions, fed-



eral court review of those requests, including possible review by this Court, would always be available.<sup>4</sup> In any review of such variance requests, this Court could issue an opinion dispositive of the proper scope of BPT variance clauses for all industries. Moreover, should a future BPT variance request by any industry arise under the jurisdiction of the D.C. Circuit, that Court may at last reach a "final review" of this issue. See *Weyerhaeuser*, 590 F.2d at 1032, 1033 n.29. Only then would any conflict between the Fourth and D.C. Circuits be concrete and appropriate for resolution by this Court.

B. *The BPT Variance Issue Does Not Pose an Important Federal Question.* The Government claims that the BPT variance issue raises an important federal question because EPA's ability to effectively administer and enforce effluent limitations will be severely impeded unless this Court immediately determines the proper scope of a BPT variance clause for all industries. There is no basis for this contention.

The proper scope of BPT variances for the crushed stone, construction sand and gravel and coal industries was a significant issue at the time the actions for review in *Consolidation Coal* and *Crushed Stone* were filed in the Fourth Circuit. However, it is now over two years after the July 1, 1977 deadline for complying with BPT effluent limitations. It is reasonable to assume that most petitions for BPT variances would have been filed by now.

<sup>4</sup> Any future BPT variance request will most probably occur in the context of an actual NPDES permit application. Section 509 (b)(1) of the Act provides for federal appellate court review of any EPA-issued permit. 33 U.S.C. § 1369(b)(1) (1976). See generally *Weyerhaeuser*, 590 F.2d at 1033 n.29. At least one court has also held that federal district courts may review EPA's veto of a state-issued NPDES permit which the Agency deems to contain an improper BPT variance. *Crown Simpson Pulp Co. v. Costle*, 599 F.2d 897, 904 & n.5 (9th Cir. 1979). See also *Republic Steel Corp. v. Train*, 581 F.2d 1228 (6th Cir. 1977) (court of appeals review of EPA veto of state issued permit).

The Government does not offer any support for its fear that it will be deluged by BPT variance requests from dischargers in the steam electric, crushed stone or coal industries in reliance on the Fourth Circuit's decisions in *Appalachian Power*, *Crushed Stone* or *Consolidated Coal* or that it will receive numerous requests from dischargers in other industries claiming that they should also be beneficiaries of the Fourth Circuit's reasoning.<sup>5</sup> In other words, the issue is now of less than critical importance.<sup>6</sup>

Nor are the Fourth Circuit's decisions disruptive of the Act's goal of nationally uniform discharge limitations. The purpose of any variance is to provide a "safety value" from a uniform regulatory scheme that otherwise would be unduly rigid. The Fourth Circuit has merely interpreted the proper scope of the variance clause contained in EPA's nationally applicable regulations for one industry. If the Government's assertions were correct, any variance clause would be disruptive of the goals of the

<sup>5</sup> The *Appalachian Power* decision was issued in mid-1976 and the Fourth Circuit's mandate shortly thereafter. It is most likely that any variance requests based on that decision would have been filed by now. Since virtually all of the BPT limitations for the crushed stone, construction sand and gravel industry were set aside by the Fourth Circuit in *Crushed Stone*, it is unlikely that many variance requests will be submitted by dischargers in that industry. And, EPA has not provided any evidence that it has reason to expect numerous requests for variances from dischargers in the coal industry.

<sup>6</sup> The Government's argument that this issue poses an important federal question ignores another crucial fact. Point source dischargers in major industries will have to comply with BAT limitations for toxic pollutants and BCT limitations by July 1, 1984. 33 U.S.C. § 1311(b)(2)(C), (E) (Supp. I, 1977). See generally *NRDC v. Train*, 8 ERC 2120 (D.D.C. 1976), as modified, 12 ERC 1833 (D.D.C. 1979). Installation of the complex technology necessary to meet these second-stage effluent limitations will necessarily require considerable time and effort. Clearly, most dischargers will be preparing to comply with BAT and BCT limitations rather than seeking to obtain variances from BPT limitations with which the Act required them to comply by 1977.

Act. The Court has previously rejected this view. See *duPont v. Train*, 430 U.S. at 128.

The Government also contends that significant increases in water pollution will occur as a result of the Fourth Circuit's decisions because EPA will be forced to grant numerous 1977 BPT variance requests based only on the discharger's economic capability. See Petition at 15-16. This concern ignores the actual holding in *Crushed Stone*. As discussed above, the Fourth Circuit never held that the individual discharger's economic inability to comply was by itself a sufficient basis for granting a BPT variance. Instead, that court made clear that "progress towards the elimination of discharge of pollutants" or effluent reduction benefits was an equally important factor. See 601 F.2d at 123-24.

C. *The Fourth Circuit's Review of the BPT Variance Was Not Premature.* Contrary to the Government's assertions, the Fourth Circuit correctly decided that the BPT variance clauses for the coal and crushed stone industries were ripe for judicial review. And, the D.C. Circuit was in agreement with the Fourth Circuit on this issue.<sup>7</sup> In fact, the Government itself admits "the Administrator's position on the variance clause has now become clear and presents a discrete legal issue that is capable of pre-enforcement review." Petition at 21.

Moreover, EPA promulgated the BPT variance provisions at issue in *Crushed Stone* and *Consolidated Coal* as a part of effluent limitations guidelines regulations for those industries. Section 509 of the CWA expressly provides for federal appellate court review of EPA's "action . . . in approving or promulgating any effluent limitation

<sup>7</sup> "In the three years that have now elapsed since *duPont* was briefed and argued in the Fourth Circuit . . . enough indicia of the Agency's attitude toward the 1977 variance provision under the Act has accumulated so that its administration is anything but 'a matter of speculation.'" *Weyerhaeuser*, 590 F.2d at 1032.

or other limitation under section 301." 33 U.S.C. § 1369 (b) (1) (1976). Indeed, after this Court's *duPont* decision, some review of these variance provisions was essential to determining the validity of EPA's regulations establishing uniform BPT effluent limitations. See 430 U.S. at 128; *Weyerhaeuser*, 590 F.2d at 1032.

Finally, this Court in *duPont* did not hold that any judicial review of a BPT variance clause must await an actual application for a variance. Instead, this Court simply deemed any consideration of the proper scope of such a clause premature in that case. 430 U.S. at 128 n.19. This deferral of consideration was reasonable because EPA had at that point not clearly stated its final position on the issue. Only when EPA's position was clarified did the Fourth Circuit address the issue. See *Appalachian Power*, 545 F.2d at 1359 n.22. Also, the BPT variance issue raised in *Crushed Stone* and *Consolidated Coal* was not before this Court in *duPont* because it was not raised by either the chemical company petitioners or EPA in that case. Consequently, the Court could not have reached the issue because its holdings are limited to the issues actually presented it for decision. Cf. *Baker v. Carr*, 369 U.S. 186, 265-66. (1962) (Stewart, J., concurring) (Court's opinions restricted to those issues properly before it).

D. *The Fourth Circuit's Decisions Were Correct.* The Fourth Circuit in *Appalachian Power* held that any BPT variance must consider at least all the factors relevant to establishing BPT effluent limitations. 545 F.2d at 1359.<sup>8</sup>

<sup>8</sup> Much of the Government's argument ignores the fact that a BPT variance does not relieve the discharger from meeting BPT limitations. Instead, as EPA itself has previously stated, a BPT variance clause "allows case-by-case redefinitions of BPT where one can show that certain plant-specific factors . . . are 'fundamentally different' from the factors EPA considered in setting the national guidelines." 43 Fed. Reg. 50042 (Oct. 26, 1978). See also *Weyerhaeuser*, 590 F.2d at 1034-36.

The D.C. Circuit in *Weyerhaeuser* agreed with the Fourth Circuit on this issue. See 590 F.2d at 1035-36. This requirement entails some consideration of cost versus pollution reduction since BPT limitations themselves must reflect this consideration. See 33 U.S.C. § 1314(b)(1)(B) (1976). The Fourth Circuit also reasoned that it would be incongruous if BPT limitations were to be more rigorous and less flexible than BAT limitations, since Congress clearly intended these BAT limitations to be the most demanding technology-based pollution controls on existing sources. *Crushed Stone*, 601 F.2d at 124; *Appalachian Power*, 545 F.2d at 1359. Finally, the Fourth Circuit expressly rejected the argument that an individual discharger's economic inability to comply with national BPT limitations requires that he be granted a variance from those limitations. 601 F.2d at 123-24. On the contrary, the court concluded only that the discharger's economic capability should be considered as one factor in a BPT variance determination if he is also making every possible effort to eliminate his pollution discharges, and if those efforts "will result in reasonable further progress" toward eliminating those discharges. 601 F.2d at 124.

Those portions of the Act's legislative history cited by the Government, at pages 17-18 of its Petition are inapposite. Congress did not address the issue of BPT variances when drafting the FWPCA. Instead, such a variance is required in order to preserve EPA's ability to promulgate effluent limitations as nationally uniform regulations. See *duPont v. Train*, 430 U.S. at 128. Both the *duPont* decision and the Fourth Circuit's seminal *Appalachian Power* opinion, however, were issued prior to the enactment of the Clean Water Act in 1977. Yet Congress disapproved neither decision when amending the FWPCA. The Government's efforts to buttress its arguments through a misapplication of portions of the legislative history of the 1972 FWPCA should be disregarded.

In any event, the legislative history of the FWPCA indicates that the Fourth Circuit was correct in its view of the proper consideration of costs in a BPT variance proceeding. Rep. Jones, in explaining the Conference Committee Report on the FWPCA on the floor of the House, defined "total costs" as used in section 304(b)(1)(B) as

"costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation and rural area economic development sustained by the community area, or region."

1 Leg. Hist. at 321. Since consideration of these external costs would necessarily entail consideration of whether the costs of the limitations would force a shut-down of the particular discharger, it is hard to see how one could avoid considering "economic capability" in the context of consideration of "total costs."

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 79-770

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.

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DOUGLAS M. COSTLE, ADMINISTRATOR,  
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CONSOLIDATION COAL COMPANY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONERS**

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1. Respondents argue that there is no conflict in the circuits. That assertion simply cannot withstand scrutiny. The Fourth Circuit in the cases presented for review has remanded EPA's BPT variance clauses and has ordered EPA to revise them to include Section 301(c) factors (Pet. App. 29a-35a, 50a-52a). The District of Columbia Circuit, on the other hand, has upheld identical variance clauses in the face of EPA's refusal to include Section 301(c) factors. *Weyerhaeuser Co. v. Costle*, 590 F. 2d 1011, 1036 (1978). There is no way to reconcile those holdings.



2. Respondents further argue that no important question is presented. They state that because the 1977 BPT deadline has passed, most petitions for BPT variances would have been filed by now. Moreover, they say that the Act will in any event require pollution dischargers to meet more stringent limitations (such as BAT) by 1984-1987.

Respondents overlook two points. First, a pollution discharger's BPT compliance costs are not limited to a one-time capital investment for control equipment; the costs of operating and maintaining that equipment over the years can often be substantial. Thus, a discharger now in compliance with BPT may well seek a Section 301(c) variance from BPT in the future if the Fourth Circuit's decisions are allowed to stand. Second, although Section 301(c) allows dischargers to seek relief from BAT on grounds of affordability, the Act, as we construe it, does not authorize limitations less stringent than BPT levels. Yet, under the Fourth Circuit's interpretation, limitations less stringent than BPT levels *would* be permitted. Thus, unless this Court intervenes, the practical effect of the decision below, and the conflict, will continue beyond 1987.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1979

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**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 79-770

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

*v.*

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.

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DOUGLAS M. COSTLE, ADMINISTRATOR,  
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

*v.*

CONSOLIDATION COAL COMPANY, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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**BRIEF FOR THE PETITIONERS**

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**OPINIONS BELOW**

The opinion of the court of appeals in *National  
Crushed Stone Association v. EPA* (Pet. App. 1a-

37a) is reported at 601 F.2d 111. The opinion of the court of appeals in *Consolidation Coal Company v. Costle* (Pet. App. 40a-78a) is reported at 604 F.2d 239.

### JURISDICTION

The judgment of the court of appeals in *National Crushed Stone Association v. EPA* was entered on June 18, 1979 (Pet. App. 38a-39a). The judgment in *Consolidation Coal Company v. Costle* was entered on June 25, 1979 (Pet. App. 79a-80a). On September 11, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 16, 1979, and on October 11, 1979, he further extended the time to and including November 15, 1979. The petition was filed on November 15, 1979, and granted on February 19, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether regulations adopted by the Administrator of the Environmental Protection Agency pursuant to Section 301(b)(1) of the Clean Water Act, 33 U.S.C. 1311(b)(1), to establish effluent limitations on discharges of pollutants, based upon the application of "best practicable control technology currently available," must include a variance provision that requires consideration of the economic ability of an individual discharger of pollutants to afford the costs of such technology.

### STATUTES AND REGULATIONS INVOLVED

Pertinent portions of the Clean Water Act, 33 U.S.C. (and Supp. I) 1311 and 1314, and Title 40 of the Code of Federal Regulations are set forth in Appendix A, *infra*, 1a-6a.

### STATEMENT

In *E. I. duPont deNemours & Co. v. Train*, 430 U.S. 112, 116-136 (1977), this Court held that Section 301(b) of the Clean Water Act, 33 U.S.C. 1311(b), authorizes the Environmental Protection Agency to promulgate regulations setting effluent limitations on the discharges of pollutants by various categories of dischargers. At issue in these suits is the validity of the regulations promulgated by EPA pursuant to Section 301(b)(1)(A) of the Act, 33 U.S.C. 1311(b)(1)(A), with regard to effluent limitations in the coal, crushed stone, and construction sand and gravel industries. See generally 40 C.F.R. Parts 434 and 436. More particularly, these cases concern whether, in acting on an application by a discharger of pollutants for a variance from the established national effluent standard, the Administrator of the EPA must consider an individual discharger's economic inability to comply with the applicable Section 301(b)(1)(A) effluent limitation.<sup>1</sup> The statutory and procedural background of this controversy is set forth below.

<sup>1</sup> The terms "effluent limitation," "discharge of a pollutant," "pollutant," and "point source" are defined in Section 502 of the Act, 33 U.S.C. (and Supp. I) 1362. See *EPA v. State Water Resources Control Board*, 426 U.S. 200, 204 (1976).

1. Concluding that earlier federal water pollution control legislation had been "inadequate in every vital aspect,"<sup>2</sup> Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 *et seq.*<sup>3</sup> This statute, now commonly referred to as the Clean Water Act, declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a)(1); see *Costle v. Pacific Legal Foundation*, No. 78-1472 (Mar. 18, 1980), slip op. 3. To achieve this goal, Congress has prohibited "the discharge of any pollutant by any person," unless that discharge complies with various provisions of the Act, including the effluent limitations and mandatory permit requirements that con-

<sup>2</sup> S. Rep. No. 92-414, 92d Cong., 1st Sess. 7 (1971), reprinted in 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Ser. No. 93-1, at 1425 (Comm. Print 1973). See also *EPA v. State Water Resources Control Board*, *supra*, 426 U.S. at 202-203.

<sup>3</sup> The 1972 Amendments substantially rewrote the Federal Water Pollution Control Act, 33 U.S.C. (1970 ed.) 1151 *et seq.* The earlier Act had unsuccessfully relied on ambient water quality standards to control the problems of water pollution. See *EPA v. State Water Resources Control Board*, *supra*, 426 U.S. at 202-203. The 1972 Amendments, as further amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and the Act of November 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467, primarily focus on "achieving maximum 'effluent limitations' on [all] 'point sources' \* \* \*." *EPA v. State Water Resources Control Board*, *supra*, 426 U.S. at 204-205 & n12.

stitute the core of this complex statutory scheme. See 33 U.S.C. 1311(a).<sup>4</sup>

a. As this Court held in *duPont v. Train*, *supra*, Congress intended that the Administrator of the EPA, pursuant to Section 301(b) of the Act, 33 U.S.C. (and Supp. I) 1311(b), would set effluent limitations for categories of "point sources."<sup>5</sup> Section 301(b) provides for the implementation of effluent limitations for existing point sources in two stages. First, Section 301(b)(1)(A) directs the Administrator to establish effluent limitations, to be met not later than July 1, 1977, "requir[ing] the application of the best practicable control technology currently available" ("1977 limitations"). Second, Section 301(b)(2), 33 U.S.C. (Supp. I) 1311(b)(2), requires EPA to set more stringent effluent limitations, to be met not later than July 1, 1987, requiring application of either "best available technology economically achievable" or "best conventional pollutant control technology", depending upon the type of pollutant ("1987 limitations").<sup>6</sup>

<sup>4</sup> Section 301(a) of the Act, 33 U.S.C. 1311(a) provides that "[e]xcept as in compliance with this section and sections [302, 306, 307, 318, 402, and 404 of the Act], the discharge of any pollutant by any person shall be unlawful." Section 301(b) ("this section") concerns "effluent limitations" and Section 402 governs the issuance of permits.

<sup>5</sup> A "point source" is a discrete outlet from which pollutants may be discharged. 33 U.S.C. (Supp. I) 1362(14). In *duPont v. Train*, the Court determined that EPA could promulgate effluent limitations on an industry-by-industry basis rather than a point source-by-point source basis. See 430 U.S. at 126-136.

<sup>6</sup> When this Court decided *duPont v. Train*, *supra*, the Act required the second level of effluent limitations (*i.e.*, "best

The provisions governing both the 1977 limitations and the 1987 limitations further state that the Administrator shall define the respective levels of pollution control technology "pursuant to Section [304(b) of the Act]." 33 U.S.C. 1311(b)(1)(A), (Supp. I) 1311(b)(2)(A) and (E). Section 304(b), in turn, explains the terms "best practicable," "best available," and "best conventional" technology. With regard to the 1977 limitations, Section 304(b)(1)(B) provides that "[f]actors relating to the assessment of best practicable control technology \* \* \* shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved" as well as "the age of equipment and

available technology economically achievable") to be achieved by 1983. The Court thus referred to these more severe standards as the "1983 limitations." As amended in 1977, Section 301(b)(2) has deferred the best available technology deadline. For certain toxic pollutants, the best available technology must now be achieved by July 1, 1984. See 33 U.S.C. (Supp. I) 1311(b)(2)(C) (Section 301(b)(2)(C)). For other pollutants, the deadline is between July 1, 1984, and July 1, 1987, depending upon when EPA establishes the limitation. See 33 U.S.C. (Supp. I) 1311(b)(2)(F) (Section 301(b)(2)(F)). Finally, for so-called "conventional pollutants" (33 U.S.C. (Supp. I) 1314(a)(4)), the Clean Water Act of 1977 requires that "best conventional pollutant control technology" be achieved no later than July 1, 1984. See 33 U.S.C. (Supp. I) 1311(b)(2)(E) (Section 301(b)(2)(E)). For purposes of this case, there is no pertinent distinction between "best available technology economically achievable" and "best conventional pollutant control technology." Because in all events the second tier of effluent limitations must be met no later than 1987, we will refer to the various different standards under Section 301(b)(2) collectively as the "1987 limitations."

facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, nonwater quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." 33 U.S.C. 1314(b)(1)(B).

With one exception, Section 304(b)(2)(B), 33 U.S.C. (Supp. I) 1314(b)(2)(B), adopts the same factors in defining best available technology (the 1987 limitations) as those employed in defining the best practicable technology. Whereas Section 304(b)(1)(B) directs the Administrator to weigh the total cost of implementing the proposed 1977 limitations against the pollution reduction benefits of those limitations, Section 304(b)(2)(B) merely provides that the Administrator "take into account \* \* \* the cost of achieving such effluent reduction." See also *American Meat Institute v. EPA*, 526 F.2d 442, 445-446 (7th Cir. 1975); 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Ser. No. 93-1, at 169-170 (Comm. Print 1973) (hereinafter "Leg. Hist.") (remarks of Sen. Muskie) ("cost-benefit analysis" inapplicable to 1987 limitations).<sup>7</sup> In addition, Congress made clear that in setting the 1987 limitations, EPA should absolutely prohibit all discharges of pollutants if "such

<sup>7</sup> Senator Muskie, the Act's primary author, further explained that ordinarily the 1977 limitations should represent "the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." The 1987 limitations, in contrast, "should, at a minimum, be established with reference to the best performer in any industrial category." 1 *Leg. Hist.* 169-170.



elimination is technologically and economically achievable for a category or class of point sources \* \* \*." 33 U.S.C. (Supp. I) 1311(b)(2)(A) (Section 301(b)(2)(A)).<sup>8</sup> Because the 1987 limitations were thus intended to be significantly more stringent than the 1977 limitations, Congress further provided that EPA may modify the 1987 limitations as applied to particular point sources if the discharger demonstrates that the modification "(1) will represent the maximum use of technology within [his] economic capability \* \* \* and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. 1311(c) (Section 301(c)). See *American Meat Institute v. EPA*, *supra*, 526 F.2d at 449 n.15.

b. To ensure compliance with these effluent limitation standards, Congress, in Section 402 of the Act, established the National Pollutant Discharge Elimination System ("NPDES"). It is unlawful for any person to discharge pollutants into the Nation's waters without an NPDES permit, and such permits incorporate the effluent limitations promulgated by EPA under Section 301(b). See 33 U.S.C. (and Supp. I) 1342(a)(1) and 1311; *Crown Simpson Pulp Co. v. Costle*, No. 79-797 (Mar. 17, 1980), slip op. 1; *Costle v. Pacific Legal Foundation*, *supra*, slip op. 3. Thus, an NPDES permit under Section 402 "serves

<sup>8</sup> In those circumstances in which application of the 1987 limitations does not result in the complete elimination of discharges, Section 301(d) of the Act requires the Administrator to review the 1987 standard periodically. See 33 U.S.C. 1311(d); *American Frozen Food Institute v. Train*, 539 F.2d 107, 116 (D.C. Cir. 1976).

to transform generally applicable effluent limitations \* \* \* into the obligations (including a timetable for compliance) of the individual discharger \* \* \*." *EPA v. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). See also *duPont v. Train*, *supra*, 430 U.S. at 119, 126 n.15.

NPDES permits are issued by the EPA or, in those covered jurisdictions in which EPA has authorized a state agency to administer the NPDES program,<sup>9</sup> by a state agency subject to EPA review. See 33 U.S.C. (and Supp. I) 1342(a)-(d); *Crown Simpson Pulp Co. v. Costle*, *supra*, slip op. 1-2, 4; *duPont v. Train*, *supra*, 430 U.S. at 119-120 & n.7; *EPA v. State Water Resources Control Board*, *supra*, 426 U.S. at 206-208.<sup>10</sup> At the same time that a discharger applies for a permit, it may also request a variance from the applicable Section 301(b) effluent limitation. See, e.g., 40 C.F.R. 434.22, 436.22. EPA has now established the 1977 limitations for 42 different industrial categories (40 C.F.R. Parts 405-460), and with respect to each category, EPA has promulgated a standard variance clause setting forth the grounds upon which the permit issuing authority may grant

<sup>9</sup> Thirty-two states and covered territories operate their own NPDES program.

<sup>10</sup> The procedures governing issuance of an NPDES permit are more fully discussed in *Costle v. Pacific Legal Foundation*, *supra*, slip op. 3-5. See also 40 C.F.R. Part 124. Review of an EPA decision refusing to issue a permit or variance (or to approve a state-issued permit or variance) lies in the court of appeals under Section 509(b)(1)(F) of the Act, 33 U.S.C. 1369(b)(1)(F). See *Crown Simpson Pulp Co. v. Costle*, *supra*.

an individual discharger a modification of the effluent limitations.<sup>11</sup>

This standard variance clause takes into account only those factors listed in Section 304(b)(1)(B)—that is, the factors that EPA must consider in setting the 1977 limitations. In other words, a discharger may obtain a variance only if it demonstrates that its particular site-specific engineering features or other characteristics enumerated in Section 304(b)(1)(B) are fundamentally different from the comparable characteristics of other, more typical dischargers in the same industry. See, *e.g.*, *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1038-1040 (D.C. Cir. 1978); 44 Fed. Reg. 32893-32894 (1979); 40 C.F.R. 434.22 (App. A, *infra*, 5a-6a). For example, a discharger might be entitled to a variance if it could show that given its unique location and circumstances, adherence to the 1977 limitations would be substantially more expensive or would consume significantly more energy or would produce sub-

<sup>11</sup> The variance clause is reprinted in full in Appendix A, *infra*, 5a-6a. In pertinent part, the standard clause states that "[a]n individual discharger or other interested person may submit evidence to [the licensing authority] that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. \* \* \* If such fundamentally different factors are found to exist, [the licensing authority] shall establish for the discharger effluent limitations \* \* \* either more or less stringent than the [1977 limitations] to the extent dictated by such fundamentally different factors."

stantially more air pollution than compliance by other members of the same industry. See 44 Fed. Reg. 32894 (1979). The variance clause does not, however, allow the permit issuing agency to consider (or to grant) a variance based upon a claim that the discharger-applicant cannot afford best practicable technology (*i.e.*, the 1977 limitations). As EPA recently explained (43 Fed. Reg. 50042 (1978) (emphasis in original)):

While EPA allows compliance costs to be considered under the [1977 limitations] variance clause, it should be noted that EPA continues to believe that § 301(c) of the Clean Water Act (allowing waivers based upon plant-specific, economic *capability* or "affordability") applies only to best available technology [1987] limitations.

Thus a plant may be able to secure a [1977 limitations] variance by showing that the plant's own compliance costs with the national guideline limitation would be *x* times greater than the compliance costs of the plants EPA considered in setting the [1977 limitations]. A plant may not, however, secure a [1977 limitations] variance by alleging that the plant's own financial status is such that it cannot afford to comply with the [1977 limitations].

See also 43 Fed. Reg. 44847-44848 (1978); *In re Louisiana-Pacific Corp.*, 10 E.R.C. 1841 (1977) (decision of the Administrator).

2. In April 1977, EPA promulgated the 1977 limitations for certain subcategories of the coal mining industry, including coal preparation plants, acid mine drainage and alkaline mine drainage (42 Fed. Reg.

21380 *et seq.*, adopting 40 C.F.R. Part 434). In July 1977, EPA promulgated the 1977 limitations for the crushed stone and construction sand and gravel subcategories of the mineral mining and processing category (42 Fed. Reg. 35843 *et seq.*, adopting 40 C.F.R. Part 436). Both regulations included EPA's standard variance provision for each subcategory.<sup>12</sup>

Petitions to review both sets of regulations were filed in various courts of appeals under Section 509 (b)(1)(E), 33 U.S.C. 1369(b)(1)(E), and all petitions were ultimately transferred to the Fourth Circuit.<sup>13</sup> The petitions challenged the regulations on various grounds, including the adequacy of the variance clauses. Relying on the Fourth Circuit's prior decision in *Appalachian Power Co. v. Train*, 545 F.2d 1351 (1976), respondents claimed that the variance clauses were invalid because EPA refused to consider an individual discharger's economic ability to afford best practicable technology. According to respondents, Section 301(c) requires EPA to take "affordability"

<sup>12</sup> 40 C.F.R. 434.22 (coal preparation plants); 40 C.F.R. 434.32 (acid mine drainage); 40 C.F.R. 434.42 (alkaline mine drainage); 40 C.F.R. 436.22 (crushed stone) and 40 C.F.R. 436.32 (construction sand and gravel).

<sup>13</sup> Because the variance clause regulation was an integral part of the 1977 effluent limitations promulgated by EPA, the court of appeals had jurisdiction to review the variance clause as "the Administrator's action \* \* \* in approving or promulgating any effluent limitation or other limitation under section 1311 \* \* \* of this title [section 301 of the Act]." 33 U.S.C. 1369(b)(1)(E). See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1033 n.29 (D.C. Cir. 1978); cf. *Crown Simpson Pulp Co. v. Costle*, *supra*.

into account when it reviews a request for a variance from the 1977 limitations.

In *National Crushed Stone Association v. EPA*, the court of appeals upheld (Pet. App. 29a-35a) respondents' challenge to the variance clauses promulgated in connection with the mineral mining regulations. See 40 C.F.R. 434.22, 434.32, and 434.42.<sup>14</sup> Following its earlier decision in *Appalachian Power Co. v. Train*, *supra*,<sup>15</sup> the court concluded that variance clauses pertaining to the 1977 limitations must per-

<sup>14</sup> The court also vacated and remanded the substantive mineral mining regulations on various grounds (Pet. App. 14a-29a). Those issues are not before the Court.

<sup>15</sup> In *Appalachian Power Co. v. Train*, *supra*, the court of appeals had remanded a similar variance clause pertaining to the steam electric power industry (see 39 Fed. Reg. 36186 *et seq.* (1974)), on the ground that "EPA should come forward with a meaningful variance clause applicable to existing as well as new sources, taking into consideration at least [the] statutory factors set out in §§ 301(c), 304(b)(1)(B) and 306(b)(1)(B)." 545 F.2d at 1359-1360 (footnote omitted). The court there concluded (545 F.2d at 1359):

Clearly, the Act, in its regulatory plan, contemplates increasingly stringent control measures for existing and new sources culminating in the elimination of the discharge of all pollutants into navigable waters by 1985. We are of opinion that the initial phase of these regulations, the 1977 standards and the subsequent new source limitations, were not intended to be applied any less flexibly than the final Phase II-1983 [now 1987] requirements. Thus, if such factors as the economic capacity of the owner or operator of a particular point source is relevant in determining whether a variance from the 1983 standards should be permitted; they should be equally relevant when applied to the less stringent 1977 standards as well as the new source requirements.

mit consideration of the same factors that Section 301(c) of the Act requires the agency to weigh in acting on variance applications from the 1987 limitations—specifically, the economic capability of the individual discharger. In the court of appeals' view, a contrary decision "could easily close a plant in 1979 which would be allowed to operate under a variance in 1983" (Pet. App. 34a).

In *Consolidation Coal Company v. Costle*, the court of appeals generally affirmed EPA's regulations governing the coal mining industry (Pet. App. 40a-78a). As in *National Crushed Stone Association*, however, it concluded that the variance clauses adopted by EPA with regard to the 1977 limitations were unduly restrictive (Pet. App. 50a-52a). Accordingly, it remanded the variance clauses to EPA "for revision to conform with *National Crushed Stone*" (*id.* at 52a). See also *Appalachian Power Co. v. Train*, Nos. 74-2096 etc. (4th Cir. Apr. 28, 1980), slip op. 17.

#### SUMMARY OF ARGUMENT

This case poses the question whether the Clean Water Act, 33 U.S.C. 1251 *et seq.*, requires EPA to grant a variance from the 1977 effluent limitations to an individual discharger that cannot afford to meet those standards. Relying exclusively on its prior decision in *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976), the court of appeals summarily concluded that EPA must take into account the economic circumstances of the individual discharger. That conclusion is not supported by the

language and structure of the statute. Section 301(b)(1)(A) of the Act states that the 1977 limitations "shall require the application of the best practicable control technology currently available," as that term is defined in Section 304(b)(1)(B) of the Act. Although Section 304(b)(1)(B) directs the Administrator to weigh the "total cost" to industry against "the effluent reduction benefits to be achieved" in establishing the 1977 limitations, no provision of the Act suggests that EPA must, or even may, consider the individual discharger's ability to afford "best practicable control technology."

In contrast, Congress expressly provided that EPA could grant a variance from the more stringent 1987 limitations ("best available technology *economically achievable*") to an individual discharger that could not afford to comply with those effluent limitations. Section 301(c) specifies that such a modification is permissible solely with regard to the 1987 limitations and only if the individual discharger demonstrates that the variance "will represent the maximum use of technology within [its] economic capability" and "will result in reasonable *further* progress toward the elimination of the discharge of pollutants." 33 U.S.C. 1311(c) (emphasis supplied). In light of the requirement that a Section 301(c) variance from the 1987 limitations make further progress in pollution control beyond the level already established by the 1977 limitations, it is clear that Congress purposefully excluded the 1977 limitations from the purview of Section 301(c). Accordingly, the court of



appeals' application of Section 301(c) to the 1977 limitations is wholly unwarranted.

The legislative history of the Act confirms that Congress deliberately adopted "best practicable control technology" (the 1977 limitations) as a *minimal* level of effluent control that *all* dischargers within a category or class had to meet, even if the cost of compliance could force certain point sources to cease operations. See, *e.g.*, S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 121 (1972) (reprinted at 1 Leg. Hist. 304); H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 100-101, 107 (1972) (reprinted at 1 Leg. Hist. 787-788, 794); 1 Leg. Hist. 169-170 (remarks of Sen. Muskie, primary author of the Act); *id* at 156, 217-218, 523. As Representative Jones of Alabama, Chairman of the House Conferees on the Act, explained (1 Leg. Hist. 231-232; emphasis supplied):

If the owner or operator of a given point source determines that he would rather go out of business than meet the 1977 requirements, the managers clearly expect that any discharge [permit] issued in the interim would reflect the fact that *all discharges not in compliance with such "best practicable control technology currently available" would cease by June 30, 1977.*

\* \* \*

\* \* \* [S]ection 301(c) authorizes a case-by-case evaluation of any modification to the July 1, 1983, requirement proposed by the owner or operator.

\* \* \*

*This provision is not intended to justify modifications which would not represent an upgrading over the July 1, 1977, requirements of "best practicable control technology."*

In short, Congress deliberately and emphatically concluded that "a plant-by-plant determination of the economic impact of [a 1977] effluent limitation is neither expected, nor desired, and, in fact, it should be avoided" (1 Leg. Hist. 255) (remarks of Rep. Dingell).

In our submission, the language and legislative history of the Act described above leave no room for doubting that EPA's construction of the Act is "sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency." *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975). Indeed, this Court has repeatedly stressed that EPA's interpretation of the environmental laws is entitled to particular deference because of the complex and scientific nature of the statutes that must be administered by EPA. See, *e.g.*, *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 134-135 (1977); *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976); *EPA v. State Water Resources Control Board*, 426 U.S. 200, 226-227 (1976); *Train v. Natural Resources Defense Council, Inc.*, *supra*. Here, the court of appeals' failure to defer to EPA's consistent administrative construction is particularly objectionable, because the legislative debates and hearings accompanying the 1977 amendments to the Act strongly evidence Congress' acquiescence in EPA's implementation of the 1977 limitations.



## ARGUMENT

### THE CLEAN WATER ACT DOES NOT REQUIRE EPA TO GRANT A VARIANCE FROM THE 1977 EFFLUENT LIMITATIONS TO AN INDIVIDUAL DISCHARGER BASED ON ITS INABILITY TO AFFORD "BEST PRACTICABLE TECHNOLOGY"

#### A. Introduction

The statutory scheme underlying this controversy has been canvassed in detail elsewhere. See, e.g., *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 116-121 (1977); pages 4-11, *supra*. In sum, Section 301(b) of the Clean Water Act, 33 U.S.C. (and Supp. I) 1311(b), directs EPA to establish two levels of progressively more stringent effluent limitations. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1019 (D.C. Cir. 1978). Section 304(b), in turn, enumerates the various factors that EPA must consider in setting the 1977 and 1987 limitations. See 33 U.S.C. (and Supp. I) 1314(b). EPA has always interpreted the less than pellucid language of the Act as permitting the Administrator to determine the effluent limitations on an industry-wide rather than plant-by-plant basis. At the same time, because EPA cannot analyze the relevant characteristics of every discharger in a particular industry before setting the 1977 limitations,<sup>16</sup> EPA's regulations have consis-

tently allowed for variances from the 1977 limitations in circumscribed cases. See pages 9-11, *supra*; *duPont v. Train*, *supra*, 430 U.S. at 128.

In *duPont v. Train*, *supra*, this Court upheld EPA's overall construction of the Act. Although recognizing that the Act did not expressly mandate the agency's approach to the question of effluent limitations, the Court concluded that Section 301(b) of the Act "authorizes the 1977 limitations \* \* \* to be set by [industry-wide] regulation, so long as some allowance is made for variations in individual plants." 430 U.S. at 128. The court did not, however, pass upon the actual variance clause then in existence. *Id.* at 128 n.19.

At issue in these cases is the scope of EPA's standard variance clause promulgated with respect to the 1977 limitations. Though EPA has changed its variance clause from time to time since the *duPont* decision, it has always ruled that an individual discharger may not obtain a variance merely because it cannot afford to comply with the 1977 limitations. Instead, under the current regulations, EPA may grant a variance to an individual discharger based on the agency's reconsideration of the factors enumerated in Section 304(b)(1)(B)—that is, the same factors that EPA must evaluate in setting the 1977 limitation in the first instance. In other words, an individual point source may be permitted to operate under modified effluent limitations, if it can demonstrate that it is fundamentally different from other

<sup>16</sup> The Act places severe time limits on EPA. See *duPont*, *supra*, 430 U.S. at 122-124 & n.13, 131-132. It is therefore impossible for EPA to make a thorough survey of each discharger in every industry. For example, there are more than 4,800 crushed stone facilities (C.A. App. 275).

more typical members of the same industry with respect to one or more of the factors listed in Section 304(b)(1)(B). See, e.g., 40 C.F.R. 434.22; *In re Louisiana-Pacific Corp.*, 10 E.R.C. 1841 (1977) (decision of the Administrator).

Without discussing either the language or legislative history of the Act, the court of appeals in these cases held that EPA's standard variance clause was unduly restrictive. It apparently concluded that Section 301(c) of the Act, 33 U.S.C. 1311(c), requires EPA to take into account the economic difficulties of the individual discharger when evaluating a request for a variance from the 1977 limitations. We submit that the language and legislative history of the Act squarely refute this conclusion and that the court below should have deferred to the consistent and reasonable administrative construction of the Clean Water Act at issue here.<sup>17</sup>

<sup>17</sup> In our petition for a writ of certiorari, we noted (Pet. 20-22) that these cases present a substantial ripeness question. We therefore suggested (Pet. 22) that if the Court agreed that respondents' challenge to the variance provision promulgated by EPA with regard to the 1977 limitations was premature that it vacate the decisions below on that ground. If the Court disagreed with our submission regarding ripeness, however, we suggested that the Court grant plenary review to consider the merits of the variance clause controversy. The Court granted the petition for a writ of certiorari, and we now believe that it would be appropriate for the Court to resolve the statutory question at this time.

Although we are informed that none of the respondents in this case have ever filed a request for a variance based upon economic circumstances, such an application would have been a futile gesture given the "definitive" and longstanding nature of EPA's administrative construction of the Clean Water Act. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967).

## B. The Language And The Structure Of The Act Establish That "Affordability" Is Not A Basis For A Variance From The 1977 Limitations

1. Section 301(b)(1)(A) provides that the 1977 effluent limitations "shall require the application of the best practicable control technology currently available as defined \* \* \* pursuant to section [304(b) of the Act]." Section 304(b)(1)(B), in turn, carefully specifies the considerations that EPA must take into account in setting the 1977 limitations:

Factors relating to the assessment of best practicable control technology currently available to

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Moreover, here, as in *Abbott Laboratories*, "the issue tendered is a purely legal one." *Id.* at 149. Finally, withholding judicial consideration of the variance issue until a particular discharger files and is denied a request for a variance might present hardships for both parties. See *Abbott Laboratories v. Gardner*, *supra*, 387 U.S. at 152-154. Under the 90-day preclusion rule set forth in Section 509(b) of the Act, 33 U.S.C. 1369(b), respondents may well have been forever barred from challenging the variance regulation if they did not seek review in the court of appeals within 90 days of its promulgation. See *Union Electric Co. v. EPA*, 427 U.S. 246, 255-256 (1976). Cf. *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978). See also note 13, *supra*. At the same time, we are informed by EPA that a present ruling by this Court would advance rather than impede the administrative enforcement of the Act. See *Andrus v. Idaho*, No. 79-260 (Apr. 16, 1980), slip op. 6-9; compare *Abbott Laboratories*, *supra*, 387 U.S. at 154-155. In light of all these circumstances, we urge the Court to exercise its discretion to determine the statutory question posed by the parties at this time. See, e.g., *Andrus v. Idaho*, *supra*; *Abbott Laboratories v. Gardner*, *supra*; *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1032-1033 (D.C. Cir. 1978) (concluding that variance clause presents ripe issue).

comply with subsection (b)(1) of section [301] shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

Thus, in determining the 1977 limitations, EPA must weigh the "total cost" to industry against the potential "effluent reduction benefits" and must also consider various technical aspects of the particular industry in question.

But neither Section 304(b)(1)(B) nor any other provision of the Act suggests that the 1977 limitations must be tailored to remedy the financial difficulties of a particular discharger. See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1033-1038 (D.C. Cir. 1978). See also *Union Electric Co. v. EPA*, 427 U.S. 246 (1976).<sup>18</sup> The cost-benefit assessment required by Section 304(b)(1)(B) is satisfied where EPA considers whether the total economic cost to the

<sup>18</sup> In *Union Electric Co.*, the Court unanimously concluded that the Clean Air Act's directive to implement air quality plans in a "practicable" and "reasonable" fashion did not require EPA to consider the economic or technological feasibility of a state plan despite its hardships on particular dischargers.

industry of requiring one level of technology rather than another appears to be proportional to the incremental effluent reduction benefits to be derived from the application of the more expensive technology. Section 304(b)(1)(B) does not, in addition, require the agency to make a case-by-case determination whether a certain cost-effective level of technology will force a particular discharger to cut back or even cease its operations because of its financial condition. To the contrary, "the statute clearly contemplates the closing of marginal plants which cannot function economically with the costs added by [the 1977] water pollution controls." *American Frozen Food Institute v. Train*, 539 F.2d 107, 113 (D.C. Cir. 1976).

In striking contrast, Congress expressly authorized EPA to grant variances from the 1987 limitations based on a discharger's inability to afford compliance with this more stringent set of effluent controls. Section 301(b)(2)(A) states that the 1987 limitations "shall require application of the best available technology *economically achievable*." 33 U.S.C. (Supp. I) 1311(b)(2)(A) (emphasis supplied). And Section 301(c) permits EPA to "modify the requirements of subsection (b)(2)(A) of this section [the 1987 limitations]" as applied to a particular point source, provided "that such modified requirements (1) *will represent the maximum use of technology within the economic capability of the [discharger]*; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. 1311(c) (emphasis supplied). See

also 33 U.S.C. 1312(b)(2) (variance from Section 302 effluent limitations based on excessive "economic and social costs").

It is thus apparent that Congress did not intend that the agency would consider "the economic capability of the [individual discharger]" in applying the 1977 limitations to a particular point source. Although the 1987 limitations are unquestionably designed to be more stringent than the 1977 limitations,<sup>19</sup> the Administrator must consider nearly identical factors in setting both. Compare 33 U.S.C. 1314(b)(1)(B) with 33 U.S.C. (Supp. I) 1314(b)(2)(B).<sup>20</sup> Nonetheless, Section 301(c) directs EPA to consider the individual discharger's financial difficulties solely with regard to the 1987 limitations ("subsection (b)(2)(A) of this section"), and then only if the modified requirements will "result in reasonable further progress toward the elimination of

<sup>19</sup> See, e.g., *duPont v. Train*, *supra*, 430 U.S. at 121; *Weyerhaeuser Co. v. Costle*, *supra*, 590 F.2d at 1019; *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1359 (4th Cir. 1976); 1 Leg. Hist. 149, 163, 169-170 (remarks of Sen. Muskie and EPA Admin. Ruckelshaus). In fact, Section 301(b)(2)(A) makes clear that the 1987 limitations are to eliminate all discharges if "such elimination is technologically and economically achievable." 33 U.S.C. (Supp. I) 1311(b)(2)(A).

<sup>20</sup> The only difference between Section 304(b)(1)(B) and Section 304(b)(2)(B) is that the Administrator must balance "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application" in establishing the 1977 limitations, whereas the Administrator must merely consider "the cost of achieving such effluent reduction" with respect to the 1987 limitations.

the discharge of pollutants" beyond that already achieved by the 1977 limitations. See *duPont v. Train*, *supra*, 430 U.S. at 121; *American Meat Institute v. EPA*, 526 F.2d 442, 449 n.15 (7th Cir. 1975); *American Iron and Steel Institute v. EPA*, 526 F.2d 1027, 1037 (3d Cir. 1975). In short, the court of appeals' conclusion (Pet. App. 32a; *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1359-1360 (4th Cir. 1976)) that EPA must review a variance application from the 1977 limitations in accordance with Section 301(c) is wholly unjustified as a matter of statutory language. Accord, *Weyerhaeuser Co. v. Costle*, *supra*.

Indeed, in light of Section 301(c) and the other specific variance provisions carefully established by Congress throughout the Act,<sup>21</sup> there is a substantial question whether EPA need grant any variances from the 1977 limitations at all. See *duPont v. Train*, *supra*, 430 U.S. at 137-138; *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1033 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977); Kalur, *Will Judicial Error Allow Industrial Point Sources*

<sup>21</sup> See, e.g., 33 U.S.C. 1312(b)(2) (variance from Section 302 effluent limitations); 33 U.S.C. 1326(a) (variance for thermal discharge effluent limitations); 33 U.S.C. (Supp. I) 1342(d)(3) and (e) (waiver provisions regarding permit review); 33 U.S.C. (Supp. I) 1317(a) (variance from 1987 limitations regarding certain nontoxic pollutants); 33 U.S.C. (Supp. I) 1311(h) (variance from 1977 limitations for publicly owned treatment works); 33 U.S.C. (Supp. I) 1311(i) (compliance deadline extensions for publicly owned treatment works); 33 U.S.C. (Supp. I) 1319(a)(5)(B) (extensions for 1977 limitations).



to Avoid BPT and Perhaps BAT Later? A Story of Good Intentions, Bad Dictum, and Ugly Consequence, 7 Ecol. L.Q. 955 (1979). Cf. *Andrus v. Allard*, No. 78-740 (Nov. 27, 1979), slip op. 5; *Huddleston v. United States*, 415 U.S. 814, 822 (1974); *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). Of course, EPA has always permitted such variances on a limited basis, and in *duPont v. Train*, this Court upheld that practice. 430 U.S. at 128. But, the fact that the agency will issue a variance based on its reconsideration of the factors listed in Section 304 (b)(1)(B) does not mean that it must also grant variances based on the "affordability" factor covered by Section 301(c).

2. Since Section 301(c) by its plain terms does not apply to the 1977 limitations, it is not surprising that the court of appeals did not hold that variances from the 1977 limitations are governed by Section 301(c) *ex proprio vigore*. Rather, the court suggested that in its view the 1977 standards should not be applied any less flexibly than the 1987 standards, because otherwise EPA "could easily close a plant in 1979 which would be allowed to operate under a variance in 198[7]" ( Pet. App. 34a; see also *Appalachian Power Co. v. Train*, *supra*, 545 F.2d at 1359). However, as this Court explained in *duPont* with regard to a variance question similar to that at issue here, "[t]he question \* \* \* is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for *these* regulations." 430 U.S. at 138 (emphasis in original).

More important, the court of appeals' repeated rejection of the standard variance clause appears to be premised on a misreading of the Act. The 1977 limitations are a minimal level of effluent control to be complied with by all dischargers now and in the future. Any "affordability" variance under Section 301(c) must still "result in reasonable further progress toward the elimination of the discharge of pollutants" beyond that already required by the 1977 regulations. 33 U.S.C. 1311(c). Accordingly, every discharger operating with a Section 301(c) variance is required, at a minimum, to adhere to the 1977 limitations. Thus, Section 301(c) would not allow a plant that cannot afford to comply with the 1977 limitations to reopen in 1987.

3. EPA's construction of the Act obviously creates the possibility that marginal businesses either will restrict their operations or close their doors altogether. That Congress both recognized and intended that result is evident from the face of the statute, however. Thus, Section 507(e) of the Act, 33 U.S.C. 1367, directs the Administrator to investigate "potential loss or shifts of employment which may result from the issuance of any effluent limitation \* \* \* including \* \* \* threatened plant closures or reductions in employment allegedly resulting from such limitation \* \* \*." Congress thereby sought to preclude employers from using the Clean Water Act as a scapegoat for solving labor or other problems. See 1 Leg. Hist. 217-218 (remarks of Sen. Bayh). At the same time, Section 507(e) stresses that "[n]othing in this subsection shall be construed



to require or authorize the Administrator to modify or withdraw any effluent limitation or order issued under this chapter." See also H.R. 6867, 96th Cong., 2d Sess. (1980) (proposed bill to amend Section 507(e) to require Administrator to modify effluent limitations "[i]n the case of any finding of adverse effect on employment").

Furthermore, Section 8 of the Act, 86 Stat. 898-899 (amending 15 U.S.C. 636), establishes an \$800 million fund to ameliorate the economic impact of the strict effluent limitations required by the Act. Recognizing that the cost of pollution control poses the greatest problem for smaller companies (2 Leg. Hist. 1355), Congress directed the Small Business Administration to use this fund to make loans to small business concerns "likely to suffer substantial economic injury without assistance under this subsection." 15 U.S.C. 636(g)(1). If Congress had intended that the 1977 limitations be modified on behalf of financially troubled companies, such assistance would, of course, be unnecessary.

### C. The Decisions Of The Court Of Appeals Are Squarely Inconsistent With The Legislative History Of The Act

In view of the explicit limiting language of Section 301(c), the court of appeals should not have extended the scope of that provision to encompass the 1977 limitations unless the legislative history of the Act unequivocally demonstrates that Congress intended that result. However, no citation to the legislative history concerning the 1977 limitations and Section 301(c) appears in any of the court's three

decisions striking down EPA's variance clause. See Pet. App. 29a-35a, 50a-52a; *Appalachian Power Co. v. Train*, *supra*, 545 F.2d at 1358-1360.<sup>22</sup> More important, the pertinent congressional reports and debates, which are discussed in detail below, convincingly demonstrate that the economic hardships of individual operators are not proper grounds for excusing their compliance with the 1977 limitations. As the District of Columbia Circuit concluded in *Weyerhaeuser Co. v. Costle*, *supra*, 590 F.2d at 1037, the extensive legislative deliberations regarding the Clean Water Act show that Congress "self-consciously made the legislative determination that the health and safety gains that achievement of the

<sup>22</sup> Compare *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976) ("To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA [Clean Water Act] in discerning its meaning, the court was in error"). The District of Columbia Circuit, in contrast, after thoroughly reviewing the language and legislative history of the Act, upheld the variance regulation at issue here (*Weyerhaeuser Co. v. Costle*, *supra*, 590 F.2d at 1036 (emphasis in original; footnote omitted)):

We have explored this issue carefully, and we express our conclusion emphatically: Although the "total cost" of pollution control at the petitioning mill must be considered under a satisfactory variance provision, it is only relevant "in relation to the effluent reduction benefits to be achieved" at that mill, section 304(b)(1)(B); so long as those costs relative to the pollution reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in fact the inability, of the operator to absorb the costs need not control the variance decision.

We reach this conclusion under the statute only after satisfying ourselves that the legislative intent is as clear as the result is harsh.

Act's aspirations would bring to future generations will in some cases outweigh the economic dislocation it causes to the present generation."

1. The legislative history unequivocally shows that Congress intended EPA to set the 1977 limitations on an industry-wide basis and that neither Section 304(b)(1)(B) nor Section 301(c) requires EPA to grant variances from the 1977 limitations to individual point sources in financial difficulty. For example, the Conference Report points out (1 Leg. Hist. 302-304; see *duPont v. Train, supra*, 430 U.S. at 129), that by July 1, 1977 "all point sources of pollution \* \* \* must have in use the best practicable treatment technology [the 1977 limitations]" and that, in contrast, the second level of effluent limitations are subject to modification in accordance with Section 301(c).<sup>28</sup> The Report further states (1 Leg. Hist. 304, 309):

The conferees intend that the Administrator \* \* \* will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant-by-plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable [the 1987 limitations]. The burden will be

<sup>28</sup> The 1972 legislative history refers, of course, to the "best available technology economically achievable" (33 U.S.C. (Supp. 1) 1311(b)(2)(A)) as the 1983 limitations rather than the 1987 limitations. See note 6, *supra*.

on him to show that modified requirements will represent the maximum use of technology within his economic capability and will result in reasonable further progress toward the elimination of the discharge of pollutants. \* \* \*

\* \* \* \* \*

Except as provided in Section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.

Representative Jones of Alabama, chairman of the House Conferees, in presenting the conference bill to the members of the House, likewise confirmed that only the 1987 limitations were subject to "affordability" variances under Section 301(c) and that the 1977 limitations were intended to apply to all point sources regardless of their economic circumstances (1 Leg. Hist. 231-232; emphasis supplied):

It is the intention of the managers that the July 1, 1977, requirements be met by phased compliance and that *all* point sources will be in full compliance no later than July 1, 1977. \* \* \*

If the owner or operator of a given point source determines that he would rather go out of business than meet the 1977 requirements, the managers clearly expect that any discharge is-

sued in the interim would reflect the fact that *all discharges not in compliance with such "best practicable control technology currently available" would cease by June 30, 1977.* \* \* \*

By the term "best practicable" the managers mean that all factors set forth in Section 304 (b)(1)(B) are to be taken into consideration. \* \* \* The managers expect that the total cost of application of technology in relation to the effluent limitation benefits to be achieved will always be a factor used by the Administrator in his determination of "best practicable control technology currently available" *for a given category or class of point source.*

\* \* \* \* \*

The Administrator may modify the [1987] requirements \* \* \* section 301(c) authorizes a case-by-case evaluation of any modification to the July 1, 1983 [now 1987] requirement \* \* \*.

\* \* \* \* \*

*This provision is not intended to justify modifications which would not represent an upgrading over the July 1, 1977, requirements of "best practicable control technology."* <sup>24</sup>

See also 1 Leg. Hist. 162-163, 169-170, 171-172; 2 Leg. Hist. 1259 (statements of Sen. Muskie); 1 Leg. Hist. 524 (remarks of Rep. Harsha); 2 Leg. Hist. 1232 (remarks of Rep. Terry) (Act "would require the best practicable technology as a floor in all

<sup>24</sup> Representative Jones' explication of the Clean Water Act also makes clear that a discharger that cannot afford to comply with the 1977 limitations will not be able to reopen under a Section 301(c) variance in 1987. See pages 26-27, *supra*. See also 1 Leg. Hist. 255 (remarks of Rep. Dingell).

cases"); *id.* at 1281 (remarks of Sen. Bentsen); *id.* at 1461-1462 (S. Rep. No. 92-414, 92d Cong., 1st Sess. 43-44 (1971)).<sup>25</sup>

In addition, the managers of the Act in both Houses of Congress carefully explained that the cost-benefit analysis required by Section 304(b)(1)(B) with respect to the 1977 limitations was not intended to permit financially troubled operators to avoid compliance. Thus, Representative Dingell, a sponsor of the bill, emphasized that "a plant-by-plant determination of the economic impact of [the 1977] effluent limitation[s] is neither expected, nor desired, and, in fact, it should be avoided" (1 Leg. Hist. 255). Similarly, after noting that the 1977 limitations applied to all industrial point sources, Senator Muskie clarified what Congress meant by the term "practicable" in Section 304(b)(1)(B) (1 Leg. Hist. 170; emphasis supplied):

The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such

<sup>25</sup> Section 301(b)(3) of the House version of the Act (H.R. 11896, 92d Cong., 2d Sess. (1971)) would have permitted EPA in appropriate circumstances to extend the deadline for compliance with the 1977 limitations for up to two years. See 1 Leg. Hist. 881, 964-965; 2 Leg. Hist. 1114-1115, 1197. The conference bill that was subsequently enacted into law does not allow for even this limited kind of variance. Kalur, *supra*, 7 Ecol. L.Q. at 962-965. In 1977, the Act was amended to permit limited delays in a few situations. See 33 U.S.C. (Supp. I) 1319(a)(5)(B).

marginal level of reduction for any class or category of sources.

The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement \* \* \* to determine the economic impact of controls on any individual plant in a single community.

It is assumed, in any event, that "best practicable technology" will be the minimal level of control imposed on all sources within a category or class \* \* \*.<sup>26</sup>

See also *id.* at 231, 237-238 (statements of Rep. Jones; emphasis supplied) ("In enforcing the 1977 'best practicable technology' regulation, the Environmental Protection Agency (EPA) would take into account the total impact of the action on plants within a given category (*e.g.*, steel, chemical, paper) considering overall financial ability to comply, and the national impact of compliance on communities and workers"); 2 Leg. Hist. 1186, 1188 ("social and economic costs \* \* \* [should not be] addressed on an *ad hoc*, case-by-case approach").

2. The legislative history also evidences Congress' understanding that implementation of strict pollution control might well force marginal enterprises in var-

<sup>26</sup> As this Court recognized in *duPont v. Train*, *supra*, 430 U.S. at 129, Senator Muskie was "perhaps the Act's primary author." His comments, as well as the statements of the other floor managers and bill sponsors, are thus entitled to particular weight. See *Simpson v. United States*, 435 U.S. 6, 13 (1978).

ious industries to cease operations. See, *e.g.*, 1 Leg. Hist. 123, 142, 156, 188, 217-218, 231, 352-353, 375, 413, 457-458, 513-514, 517, 523, 561, 601, 654-659, 710-711, 717-723, 731-733, 740, 741-745; 2 Leg. Hist. 1164, 1353-1361. *Water Pollution Control Legislation—1971: Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 857, 1165-1166 (1971); *Water Pollution Control Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess., Part 2, 622, 660-663; Part 4, 1908 (1971). For example, Senator Bentsen observed that "[t]here is no doubt that we will suffer some disruptions in our economy because of our efforts; many marginal plants may be forced to close." 2 Leg. Hist. 1282. Similarly, EPA studies submitted to, and considered by, Congress estimated that the 1977 limitations would cause the closure of perhaps 300 plants affecting between 50,000 and 125,000 workers. 1 Leg. Hist. 156, 523; CEQ-Commerce-EPA, *The Economic Impact of Pollution Control* 7, 10-11 (1972). And Representative Crane, in opposing the bill, warned that the Act "may throw literally millions of Americans out of work \* \* \*." 1 Leg. Hist. 738. See *id.* at 740 (Rep. Sikes) (4 to 5% of industry subject to closing). See also *Weyerhaeuser Co. v. Costle*, *supra*, 590 F.2d at 1025, 1036-1037; *American Iron and Steel Institute v. EPA*, 526 F.2d 1027, 1052 (3d Cir. 1975); 42 Fed. Reg. 21388 (1977) (affect of 1977 limitations on marginal coal companies); 42 Fed. Reg. 35847 (1977) (as many as 35 crushed stone facilities and 26 sand



and gravel plants might close as the result of the 1977 limitations).

Although Congress thus recognized the Act's potential for economic dislocation, it also perceived that continued polluting of this Nation's waters posed a substantially more serious "threat to life" and "the survival of our society." 1 Leg. Hist. 122, 618 (remarks of Sen. Muskie and Rep. Roe). See generally *id.* at 95-136 (debate on overriding presidential veto); *id.* at 741 (remarks of Rep. Drinan regarding "national emergency"); *id.* at 753, 862-863 (H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 66, 393-394 (1972); 2 Leg. Hist. 1253, 1263-1264, 1286 (remarks of Sens. Muskie and Bentsen). Accordingly, Congress deliberately chose not to permit variances from the 1977 limitations on the ground of financial hardship. As Senator Nelson explained (2 Leg. Hist. 1355):

[T]he approach of giving variances to pollution controls based on economic grounds has long ago shown itself to be a risky course: All too often, the variances become a tool used by powerful political interests to obtain so many exemptions for pollution control standards and timetables on the flimsiest of pretenses that they become meaningless. In short, with variances, exceptions to pollution cleanup can become the rule, meaning further tragic delay in stopping the destruction of our environment.

See also *Weyerhaeuser Co. v. Costle*, *supra*, 590 F.2d at 1036-1037; LaPierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 Iowa L. Rev. 771, 819-820 (1977); Parenteau & Tauman,

*The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972?*, 6 Ecol. L. Q. 1, 55 (1976).

In fact, the relevant congressional debates show that Congress specifically created the \$800 million revolving loan fund discussed above (page 28, *supra*) as an "alternative to \* \* \* waiving strict environmental standards where economic hardship could be shown." 2 Leg. Hist. 1355 (remarks of Sen. Nelson). See generally *id.* at 1353-1361. Senator Nelson, the author of Section 8 financing, proposed such funding to extend

Federal aid to those small businesses who would be crushed economically in meeting pollution control requirements but who could make it otherwise. An important benefit of the proposal should be aiding in reconciling any potential point of conflict that might occur between the goal of a decent environment and the goal of a diversity in American life based on the opportunity for small businesses \* \* \*.

1 Leg. Hist. 1356.<sup>27</sup> Congress thereafter overwhelmingly adopted this proposal on the specific understanding that such loans would be available only to

<sup>27</sup> Senator Nelson offered his amendment in the hope "that while many otherwise viable small businesses may not be able to afford the immediate cost of the capital investment necessary to meet the water pollution control requirements, they could in fact manage these costs if given the benefit of low-cost, long-term loans." The loans were designed to carry four percent interest payable over as long a period as 30 years. 2 Leg. Hist. 1353, 1357.



the facilities that EPA certified as meeting effluent limitation standards. *Id.* at 1360. See 2 Leg. Hist. 1218, 1353-1362; 1 Leg. Hist. 148, 152, 214, 336-337, 358, 369, 404, 449-450, 467, 509, 566, 664, 717, 742, 762, 829-830, 858.<sup>28</sup>

**D. The Agency's Consistent And Reasonable Construction Of The Act Is Entitled To Great Deference**

It is well settled that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong \* \* \*." *E. I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). See also *Udall v. Tallman*, 380 U.S. 1, 16 (1965). And where, as here, an agency is charged by Congress with issuing substantive regulations and standards regarding a complex, scientific statute, its interpretations and rulings are entitled to particular deference unless plainly "irrational." *Ford Motor Credit Co. v. Milhollin*, No. 78-1487 (Feb. 20, 1980), slip op. 12. See, e.g., *duPont v. Train*, *supra*, 430 U.S. at 134-135 & n.25; *Union Electric Co. v. EPA*, *supra*, 427 U.S. at 256; *EPA v. State Water Resources Control Board*, 426 U.S. 200, 226-227 (1976);

<sup>28</sup> Congress has also provided for the rapid depreciation of all pollution control facilities. 26 U.S.C. 169 (60 months' depreciation period); see 2 Leg. Hist. 1175. See also pages 27-28, *supra*, and 1 Leg. Hist. 217-218, 654-659, 712-723, 732-733 (discussing limited protection provided by Section 507(e) for workers unemployed as a result of effluent limitations).

*Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75, 87 (1975).<sup>29</sup>

The court of appeals thus erroneously set aside the variance provisions at issue in these cases. Although EPA has modified its (1977 limitations) variance clause from time to time in respects not relevant here, it has never waived from its position that inability to comply with the 1977 limitations is not a ground for a variance. See, e.g., 39 Fed. Reg. 30073 (1974); 40 C.F.R. 434.22 (1976); *In re Louisiana-Pacific Corp.*, 10 E.R.C. 1841, 1850-1853 & nn.27 & 30 (1977) (decision of Administrator); 43 Fed. Reg. 50042 (1978); 44 Fed. Reg. 32893-32894 (1979); 40 C.F.R. 434.22. Moreover, it seems beyond dispute that the agency's well-articulated construction cannot fairly be characterized as "irrational," given the language and legislative history limned above. In short, EPA's variance regulations are "sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency." *Train v. Natural Resources Defense Council, Inc.*, *supra*, 421 U.S. at 87. Accord, *Weyerhaeuser v. Costle*, *supra*; *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1033 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977).

Furthermore, EPA's regulations are entitled to particular weight because Congress has "acquiesced in [EPA's] interpretation of the statute." *Board of*

<sup>29</sup> Various provisions of the Act, including Sections 301 and 304 require the Administrator to issue regulations. See also 33 U.S.C. 1251, 1312, 1313, 1316(b), 1342(a)(2), 1361(a); 33 U.S.C. (and Supp. I) 1314, 1317, 1321(b), 1322(b); *Weyerhaeuser Co. v. Costle*, *supra*, 590 F.2d at 1025.

*Education v. Harris*, No. 78-873 (Nov. 28, 1979), slip op. 18. See, e.g., *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, No. 78-1651 (Feb. 20, 1980), slip op. 23-24; *Andrus v. Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6; *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). In 1977, in the course of extensively amending the Act, Congress thoroughly reviewed "the 1977 requirements for best practicable technology \* \* \* and the manner in which [they have] been administered." 3 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act*, Ser. No. 95-14, at 369 (Comm. Print 1978) (remarks of Rep. Clausen) (hereinafter "Cont. Leg. Hist.>"). See, e.g., H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 76-78, 85 (1977) (reprinted at 3 Cont. Leg. Hist. 260-262, 269); S. Rep. No. 95-370, 95th Cong., 1st Sess. 1-2, 7-8 (1977); 3 Cont. Leg. Hist. 305, 323-324, 354-355, 368-382, 390, 396-398, 402-404, 410-414, 458-465, 496, 532-533; 4 Cont. Leg. Hist. 859-862, 1094, 1100-1101, 1117-1118, 1123, 1133-1139, 1312-1315, 1318, 1414-1415, 1430-1432, 1462-1464. See generally *Federal Water Pollution Control Act Amendments of 1977: Hearing Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess., Parts 1-10 (1977); *To Amend and Extend Authorizations for the Federal Water Pollution Control Act: Hearings on H.R. 3199 Before the Subcomm. on Water Resources of the House Comm.*

*on Public Works and Transportation*, 95th Cong., 1st Sess. (1977).

As the result of its investigation, Congress was fully aware that EPA's implementation of the 1977 limitations had caused and would continue to cause significant economic dislocation, including the closure of individual point sources. See, e.g., 3 Cont. Leg. Hist. 269, 323, 324, 368, 373, 403, 404, 410-411, 496, 534-535, 541-544; 4 Cont. Leg. Hist. 850, 1197, 1430-1432; S. Rep. No. 95-370, *supra*, at 2 (reprinted at 4 Cont. Leg. Hist. 636); *Federal Water Pollution Control Act Amendments of 1977, supra*, Part 1, at 17-18; Part 2, at 106-107; Part 3, at 324-329; *Hearings on H.R. 3199, supra*, at 319-325. In fact, several industry representatives and legislators proposed that the 1977 limitations be amended or extensively delayed because "best practicable control technology may be impossible to attain or financially beyond reach in certain cases." 3 Cont. Leg. Hist. 542 (Sen. Schweiker). See *id.* at 324, 411-412, 541-544; 4 Cont. Leg. Hist. 1312-1315; *Federal Water Pollution Control Act Amendments of 1977, supra*, Part 1, at 19, 34; Part 3, at 324; Part 10, at 379, 719, 749, 753-755; *Hearings on H.R. 3199, supra*, at 319-325; Note, *The Clean Water Act of 1977: Great Expectations Unrealized*, 47 U. Cin. L. Rev. 259, 269 (1978). Nonetheless, except for extending the compliance deadline in special cases to April 1, 1979 (33 U.S.C. (Supp. I) 1319(a)(5)(B)),<sup>30</sup> Congress "resist[ed]

<sup>30</sup> See 3 Cont. Leg. Hist. 261, 390, 396-398, 402-403, 413, 414, 451; 4 Cont. Leg. Hist. 641, 1049-1050, 1054. In addition,

attempts to provide general exemptions or extensions for the 1977 deadlines." 3 Cont. Leg. Hist. 548 (Sen. Moynihan). See S. Rep. No. 95-370, *supra*, at 7-8, 44, 60-62 (reprinted at 4 Cont. Leg. Hist. 641-642, 677, 693-695); 3 Cont. Leg. Hist. 324, 411, 541-544; 4 Cont. Leg. Hist. 859-862, 881, 898-900, 1213-1214, 1270, 1312-1313, 1318.<sup>31</sup>

Finally, we submit that any doubts on this point must be resolved in favor of the remedial purposes of the statute and the agency's reasonable interpretation. Requiring EPA to consider the economic circumstances of all or even many industrial dischargers would impose a substantial administrative burden on the limited resources of the agency and would also further delay the implementation of the 1977 limitations. Such a broad economic variance clause might well render "the pin-hole safety valve envisioned in the Act and *duPont* \* \* \* a yawning loophole." *Weyerhaeuser Co. v. Costle*, *supra*, 590 F.2d at 1040. In sum, the decisions of the courts of appeals, if affirmed, threaten the express congressional purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). See also Parenteau & Tauman, *supra*, 6 Ecol. L.Q. at 55.

Congress reemphasized that plants subject to closure because of financial inability to afford compliance are eligible for federal financial aid. See 3 Cont. Leg. Hist. 404.

<sup>31</sup> See also S. 2453 and H.R. 6867, 96th Cong., 2d Sess. (1980) (proposed bills to require EPA to modify effluent limitations if the limitations would have an adverse economic impact). See 126 Cong. Rec. S2656-S2657 (daily ed. Mar. 19, 1980).

## CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.  
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MAY 1980

**APPENDIX A**  
**STATUTES AND**  
**REGULATIONS INVOLVED**

1. Section 301 of the Clean Water Act, 33 U.S.C. (and Supp. I) 1311, provides in pertinent part:

(a) Except as in compliance with this section and sections [302, 306, 307, 318, 402, and 404 of this Act] 1312, 1316, 1317, 1328, 1342, and 1344 \* \* \*, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this [Act] there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section [304(b) of this Act, 33 U.S.C.] 1314(b) \* \* \*

\* \* \* \* \*

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with

regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

\* \* \* \* \*

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section [307 of this Act] 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A)

of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title [304(a)(4) of the Act] shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; \* \* \*

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

2. Section 304(b) of the Clean Water Act, 33 U.S.C. (and Supp. I) 1314(b), provides in pertinent part:

(b) For the purpose of adopting or revising effluent limitations under this [Act] the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of



this title [October 18, 1972], regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b) (1) of section [301 of this Act] 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b) (2) of section [301 of this Act] 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

3. Section 434.22 of Title 40, Code of Federal Regulations, as promulgated by the Environmental Protection Agency on April 26, 1977, provides in pertinent part as follows (42 Fed. Reg. 21380, 21384):

In establishing the limitations set forth in this section, EPA took into account all information

it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.

## APPENDIX B

## GENERAL DOCKET

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

Case No. 76-1690

Agency

[ May 5, 1980 ]

ON PETITION FOR REVIEW OF AN ORDER OF THE  
ENVIRONMENTAL PROTECTION AGENCY[ Illegible ] LR19 \* 76-1859, 76-1862, 76-1912, 76-1981  
and 76-1982, 76-2019, 76-2020

Related cases: 76-2059, 76-2145, 76-2146, 76-2147,  
77-1474, 77-1490, 77-1491, 77-1534,  
77-1592, 77-1593, 77-1594, 77-1828,  
77-1845, 77-1892, 77-1893, 77-1957,  
77-2088, 77-1989, 77-1990

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DOUGLAS M. COSTLE, as Administrator,  
Environmental Protection Agency, RESPONDENT

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\* Petitioning Industry Groups and Petitioning Environmental Groups allowed to file separate briefs.

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## LEAD COUNSEL FOR RESPONDENT:

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 U.S. Dept of Justice  
 Pollution Control Section  
 Land & Natural Resources Div.  
 Washington, DC 20530

DATE OF JUDGMENT: May 3, 1976

DATE	FILINGS—PROCEEDINGS
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6/25/76	Petition for review filed and cause docketed. jab
6/28/76	Notification, together with copy of petition, mailed certified mail to the respondent. jab
7/1/76	Appearance for the petitioner filed and entered. (foc)
7/6/76	Appearance for the petitioner filed and entered. (foc)
7/13/76	Appearance for the respondent filed and entered. (foc)
8/2/76	Motion of EPA to extend time to transmit the administrative record to 9/3/76, filed. epb
8/2/76	Order extending time to transmit the administrative record to Aug. 18, 1976, filed. epb
8/19/76	Certified List of EPA (Orig and 3) filed. jb
8/20/76	Briefing schedule established. jb
8/25/76	Motion to defer filing of appendix pursuant to R.30(c) FRAP, filed. Motion granted. epb
8/26/76	Motion to stay all proceedings along with a memorandum in support of the motion filed. Motion granted. epb
9/20/76	Joint motion to defer briefing until 40 days after respondent files his certified index to the record of the final effluent limitations guidelines applicable to the coal mining point source category, filed. Motion granted. epb
12/27/76	Letter/motion of agency for extension of time to 3/31/77 to complete the review process and promulgate (final-final) regulations. MOTION GRANTED. (fls)
6/3/77	Certified Index to the Supplemental Record, filed, 5/6/77. jb
6/23/77	Order consolidating 76-1690, et al and establishing briefing schedule per LR 19, filed. jb

DATE	FILINGS—PROCEEDINGS
7/1/77	Order consolidating 77-1845 with 76-1690, et al and directing adhering to the briefing schedule already established, and allowing one brief for petitioning industries and one brief for petitioning environmental group, filed. jb
7/14/77	Order consolidating 77-1892 and 77-1893 with 76-1690, et al and directing that counsel adhere [sic] to provisions of previously filed orders of 6/23/77 and 7/1/77, filed. jb
7/18/77	MOTION of the petitioners for leave to file deferred appendix per 30(c), FRAP, filed. (fls) MOTION GRANTED. (fls)
7/22/77	Petitioners' motion to extend time to file brief and appendix to 8/15/77, filed. MOTION GRANTED. (fls)
7/28/77	Order consolidating 77-1957 with 76-1690 pursuant to LR 19, filed. jb
8/5/77	Order consolidating 77-1989 and 77-1990 with 76-1690 pur LR 19 for briefing and arguing and applying provisions of previously filed orders in these cons. cases, filed. jb
8/17/77	Four (4) copies of the petitioner's brief filed. Joint with numbers 76-198, 76-2146, 77-1592, 77-1845, 76-1859, 76-2019, 76-2147, 77-1593, 77-1892, 76- , 76-2020, 76-1474, 77-1594, 77-1893, 76-1912, 76-2059, 77-1490, 77-1534, 77- , 76-1981, 76-2145, 77-1491, 77-1828. (8-15-77 dmh).
8/22/77	—Positive Local Rule 17 disclosure (Consolidation Coal Company), filed. dhh
8/17/77	Twenty Five (25) copies of petitioning Environmental Group's brief filed 8/15/77. (See 76-2020). jb
8/31/77	Order consolidating 77-2088 with 76-1690, et al, pursuant to LR 19, filed. jb
10/13/77	Twenty-five (25) copies of the petitioner's brief, Commonwealth of Penn. Department of Environmental Resources. (9-30-77 dmh).

DATE	FILINGS—PROCEEDINGS
10/17/77	MOTION of respondent for permission to file an enlarged brief not to exceed 100 pages of printing by process of duplication other than standard typographic printing, filed. (ecr) MOTION DENIED. (ecr)
11/4/77	Four (4) copies of the respondent's brief Jt. w/ 76-1859, et al., filed.
11/22/77	Nine (9) copies of the reply brief for Citizen Environmental Group Petitioner's filed. Consolidated with 76-1859 et al. (11-17-77 dmh).
11/22/77	Five (5) copies of the reply brief for Industry Petitioners filed. Consolidated with 76-1859 et al. (11-21-77 dmh).
11/25/77	MOTION of appellant to extend time to file deferred appendix to 12/5/77, filed. MOTION GRANTED. (fls)
11/25/77	Twenty-five (25) copies of the appellant's reply brief for the Commonwealth of Pa. filed. Jt. w/ 77-2088, et al. (PM 11-23-wtc)
12/12/77	Ten (10) copies of the joint appendix Volumes I, II, III, IV and a continued IV, filed. (HD 12/12-WTC)
12/12/77	Three folders as one lodged. (wtc)
12/22/77	MOTION of the industry petitioners for leave to file its initial brief 55 pages in length, filed. MOTION GRANTED. (fls)
12/22/77	25 copies Reply Brief for Industry petitioners filed. (12-19-77) dmh
12/22/77	25 copies of industry petitioners brief filed. (12-19-77) dmh
1/4/78	Respondent's motion for an extension of time to file printed briefs to 1/17/78, filed. MOTION GRANTED. (fls)

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**DATE**                      **FILINGS—PROCEEDINGS**


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- 1/19/78 Twenty-five (25) copies of the respondent's brief filed. (1-17-78 dmh). PM cs.
- 1/19/78 Positive Local 17 disclosure (plaintiffs) filed. dnb
- 3/15/78 Respondent's MOTION to file a supplemental brief, filed. (ecr)
- 3/21/78 Response to EPA's motion to file a supplemental brief, filed. (fls) Transmitted to JDB, HEW, KKH.
- 3/23/78 ORDER allowing Doulgas M. Costle, Administrator, etc. to file a supplemental brief and permitting the industry petitioner to file a response to the brief by March 27, 1978, filed. ecr Certified copies to all counsel.
- 3/22/78 Supplemental brief of respondents, filed. ecr (25 copies)
- 3/28/78 Four (4) copies of the Industry Petitioners' Brief in reply to respondent's supplemental brief filed. (3-28-78 dmh). HD.
- 3/29/78 Twenty-five (25) copies of the Industry Petitioners' brief in reply to respondent's supplemental brief filed. (3-27-78 dmh). PM.
- 10/5/78 Cause came on to be heard before Butzner, Widener and Hall, Circuit Judges, was argued by counsel and submitted. (jhl)
- 6/25/79 Opinion filed. JDB P (wu)
- 6/25/79 Opinion and Notice mailed to counsel of record. (wu)
- 6/25/79 Decree filed. Petition to set aside denied; regulations on variances remanded. (wu)
- 7/9/79 MOTION (C-70) of P for clarification of opinion, filed. (jeh) Transmitted to JDB, HEW, KKH
- 7/12/79 MOTION (C-85) of Respondent for stay of mandate filed. Transmitted to JDB, HEW & KKH. mjk

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**DATE**                      **FILINGS—PROCEEDINGS**


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- 7/20/79 Memorandum of respondent (C-70) in opposition to P's motion for clarification, filed (jeh)
- 7/31/79 Response of (C-70) Industry Petitioners to various post-decision submittals, filed (jeh) Transmitted to JDB, HEW, KKH.
- 7/31/79 Response of the Commonwealth of Pennsylvania to various post-decision submittals, filed (jeh) Transmitted to JDB, HEW, KKH.
- 8/10/79 ORDER denying motion for clarification, filed. (fls) Copy to all counsel of record. (also denying motion for stay)
- 8/28/79 Certified copy of judgment & printed copy of opinion transmitted to EPA. jhl
- 10/30/79 Letter of request for the lodged materials with the court and returned to Michael B. Barr three file folders. WTC
- 12/18/79 Notice evidencing the filing petition for writ of certiorari in the Supreme Court November 15, 1979 filed. (No. 79770) (jhl)
- 2/26/80 Certified copy of order of the Supreme Court granting certiorari February 19, 1980 filed. (jhl)



Theodore L. Garrett/secky

D.C.: 452-6000

76-1914

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

Case No. 76-1914

Agency

ON PETITION FOR REVIEW OF AN ORDER OF THE  
ENVIRONMENTAL PROTECTION AGENCY

Related: 76-1915, 76-1929, 76-1930, 76-2197  
Consolidated:

NATIONAL CRUSHED STONE ASSOCIATION, INC.,  
and LUCK QUARRIES, PETITIONERS

*v.*

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

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Lee Breckenridge  
Water Quality Division (A-131)  
U.S. Environmental Protection Agency  
Washington, D.C. 20460

DATE OF JUDGMENT: June 10, 1976

DATE	FILINGS—PROCEEDINGS
8/23/76	Petition for review filed and cause docketed. jab
8/24/76	Notification along with a copy of the petition for review mailed certified mail to the respondent. jab
9/3/76	Petitioners appearance filed and entered. (foc)
9/15/76	Order consolidating cases for oral argument filed. (76-1914, 76-1915, 76-1929, 76-1930). epb
9/22/76	Motion of Sarasota County, Fla, for leave to intervene filed. epb
9/27/76	Joint motion for deferral of proceedings pending completion of proceedings before the agency to March 31, 1977, filed. MOTION GRANTED. (fls)
9/29/76	Respondent's opposition to motion of Sarasota County, FL for leave to intervene, filed. (fls)
9/30/76	Reply of Sarasota County, Florida to respondent's opposition to motion of Sarasota County, Florida for leave to intervene filed crl
10/7/76	Motion, opposition to motion and reply to opposition transmitted to SLC.
10/15/76	Appearance for the respondent filed and entered. (foc)
11/12/76	Respondent's motion to consolidate this case with case numbers 76-1914, 1915, 1929, and 1930, for the purpose of briefing and oral argument, filed. epb
11/12/76	Order consolidating case no. 76-2197 with case nos. 76-1914, et al, filed.
12/23/76	Appearance for EPA filed and entered. (foc)
1/19/77	Motions, responses and suggested order transmitted to Judges Butzner, Boreman and Russell. (MFN/vsl)
2/22/77	ORDER denying motion of Sarasota County for leave to intervene, filed. Certified copies mailed to Scott and Taft-Graves-Ghiorzi, and Breckenridge. (fls)
3/28/77	MOTION of respondent for deferral of proceedings pending completion of proceedings before the agency, filed. (ecr)

DATE	FILINGS—PROCEEDINGS
4/11/77	Motion for deferral of proceedings pending completion of proceedings before the agency and a copy of a letter from counsel for the petitioners transmitted to HSB, JDB, DSR. (ecr)
4/13/77	ORDER granting motion to defer proceedings until May 31, 1977, filed. (ecr) Certified copies to Scott, Taft, Graves, Ghiorzi, Breckenridge, Dunkelber, Garrett, Eckert, Stephens, Rhodes, Clark, Hall.
5/19/77	MOTION for deferral proceedings pending completion of proceedings before the agency, filed. (ecr)
5/27/77	ORDER granting the motion to defer proceedings pending completion of proceedings before the agency to July 1, 1977, filed. (ecr) Certified copies to Scott, Taft, Graves, Ghiorzi, Breckenridge.
6/7/77	Appearance of Ackerly and McClure for petitioners filed and entered. mjk
7/5/77	MOTION for deferral of proceedings to August 1, 1977, filed. (ecr) MOTION GRANTED. (ecr)
7/29/77	Joint motion for deferral of proceedings until 9/15/77, filed. MOTION GRANTED. (fls)
8/5/77	Response to motion of Agrico Chemical Co. for deferral of proceedings, filed. (ecr)
9/8/77	Appearance of Garrett for petitioner filed and entered. mjk
5/11/78	ORDER allowing the petitioners and respondent to file supplemental briefs, filed. (fls) Certified copy of order mailed to Garrett-Dunkelberger; Rogers-Eckert; Taft-Brandon-Ghiorzi.
5/11/78	Supplemental brief of petitioners, filed. (fls)
5/11/78	Supplemental brief of respondent, filed. (fls)
8/8/78	Record of proceedings before EPA in three boxes, filed. jb
8/8/78	Record above mailed to Judge Widener. jb
6/13/79	Record on appeal in five boxes received from Judge Widener/ (jhl)

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**DATE                      FILINGS—PROCEEDINGS**


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- 6/18/79 Opinion remanding regulations to Agency filed.  
HEW P (wu)
- 6/18/79 Opinion and Notice mailed to counsel of record.  
(wu)
- 6/18/79 Decree filed.
- 7/11/79 Certified copy of the decree and printed copy of  
the opinion forwarded to EPA. (jhl)
- 8/1/79 RESPONSE of petitioners to EPA motion to re-  
call mandate which was filed with papers in no. 76-  
1690, et al, filed. (fls)
- 7/12/79 MOTION of EPA for stay of mandate in Nos.  
76-1690 et al and *for recall of mandate in 76-1914 et*  
*al* filed. plm
- 8/8/79 SUBMITTED to CHF/DR/HEW motion for re-  
call of mandate and the response thereto. plm
- 8/3/79 RESPONSE of petitioner to EPA's motion for re-  
call of mandate, filed. (fls) Transmitted to CHF/DR/  
HEW.
- 9/4/79 ORDER denying motion of EPA to recall the man-  
date, filed (jeh) Copy to Garrett, Dunkelberger; Bran-  
don, Taft, Ghiorzi; Rogers, Breckenridge, Eckert.
- 12/18/79 Notice evidencing the filing petition for writ of  
certiorari in the Supreme Court November 15, 1979  
filed. (No. 79-770) (jhl)
- 12/26/80 Certified copy of order of Supreme Court grant-  
ing certiorari February 19, 1980 filed. (jhl)
- 3/13/80 Certified record in three volumes transmitted to  
the Clerk of the Supreme Court. (Proceedings in  
Court of Appeals plus two copies of Appendix (Vol-  
umes one and two))
- 3/17/80 Record of proceedings before EPA in six boxes  
(6) returned to Roland Kirby.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

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**No. 79-770**

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ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner*

v.

NATIONAL CRUSHED STONE ASSOCIATION, *et al.*,  
*Respondents.*

---

DOUGLAS M. COSTLE,  
*Administrator*

ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner*

v.

CONSOLIDATION COAL COMPANY, *et al.*,  
*Respondents.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit**

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**BRIEF FOR NATURAL RESOURCES DEFENSE  
COUNCIL, INC., *AMICUS CURIAE***

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**INTERESTS OF THE NATURAL RESOURCES  
DEFENSE COUNCIL**

The Natural Resources Defense Council, Inc., ("NRDC")  
is a national environmental organization with more than 44,000

members residing in all states and territories, as well as abroad. For nearly ten years, one of NRDC's primary objectives has been to protect the integrity of our Nation's waters from polluting activities. Toward this end, NRDC has worked to bring about effective implementation of the Clean Water Act ("the Act") and its predecessor, the Federal Water Pollution Control Act Amendments of 1972. 33 U.S.C. §§ 1251, *et seq.*

At stake here is one of the Act's most important principles. In *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), this Court confirmed that Congress authorized the Administrator of the Environmental Protection Agency ("EPA" or "the Agency") to regulate industrial pollutant discharges from existing sources through the issuance of nationally uniform effluent limitations under Sections 301(b)(1)(A) and 304(b)(1) of the Act, as long as those limitations are applied with sufficient flexibility. *Id.* at 128. The decisions below represent a major excursion from that principle. The Fourth Circuit has required the Administrator to re-examine uniform limitations each time a discharger asserts a claim of economic hardship, and to consider relaxing the regulations on a case-by-case basis wherever the Agency is unable to counter those assertions with its own analyses.

NRDC has a long-standing interest in this issue. Believing that the first step toward industrial pollution control must be prompt issuance of effluent limitations, NRDC has participated extensively in litigation to enforce the Act's deadlines for promulgating these regulations. For example, NRDC brought suit when EPA missed the Act's deadline for issuing the first set of effluent limitations. In *NRDC v. Train*, 6 ERC 1033 (D.D.C. 1973), *aff'd in part and rev'd in part*, 510 F.2d 692 (D.C. Cir. 1975), the District Court established a schedule for promulgating limitations reflecting the "best practicable control technology currently available" (BPT) as required by Sections 301(b)(1)(A) and 304(b)(1) of the Act. The regulations at

issue here descended from that case.<sup>1</sup> In 1973-75, NRDC brought a series of lawsuits to remedy the Agency's failure to promulgate pretreatment standards and other controls on toxic pollutants. As a result, EPA is developing limitations reflecting the "best available technology economically achievable" (BAT)<sup>2</sup> and other standards for 21 major industrial categories under the requirements of the consent decree in *NRDC v. Train*, 8 ERC 2120 (D.D.C. 1976), *rev'd in part*, *NRDC v. Costle*, 561 F.2d 904 (D.C. Cir. 1977), *modified*, *NRDC v. Costle*, 12 ERC 1833 (D.D.C. 1979). NRDC believes that the Court's decision in this case could affect the integrity and validity of those regulations as well.<sup>3</sup>

NRDC has long been interested in the *manner* in which effluent limitations are developed and applied to individual

<sup>1</sup> See *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111, 112 n.4 (4th Cir. 1979).

<sup>2</sup> 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(2). The government's brief explains why there are different compliance deadlines for the various species of BAT, and refers to these limitations collectively as the "1987 limitations." Brief for the Petitioners, note 6. As a result of the consent decree described in the text, however, nearly all of the Agency's BAT limitations will pertain to toxic pollutants, for which the statutory compliance date is July 1, 1984. Accordingly, NRDC will use "1984" in referring to BAT limitations.

<sup>3</sup> This case involves only the proper scope of EPA's variance provision pertaining to BPT. However, EPA also has promulgated variance provisions—not specifically authorized by Congress—pertaining to BAT as well as pretreatment standards required under Section 307(b) of the Act. 40 C.F.R. § 125, 44 Fed. Reg. 32948 (June 7, 1979). The validity and proper scope of these provisions is the subject of other, pending litigation. *NRDC v. EPA*, No. 79-1618 (D.C. Cir. filed June 14, 1979); *Virginia Electric Power Co. v. EPA*, No. 79-1347 (4th Cir. filed June 14, 1979); *American Petroleum Institute v. EPA*, No. 79-2433 (5th Cir. filed June 14, 1979). NRDC believes that the Court's disposition of this case could shed light on these ancillary, yet important issues.

dischargers through the Act's permit system.<sup>4</sup> In *NRDC v. EPA*, 537 F.2d 642 (2d Cir. 1976), NRDC unsuccessfully contended that, in view of the Act's demand for uniformity, no variances should be allowed from BPT limitations. NRDC also filed *amicus curiae* briefs in the many other appellate cases which dealt with the Administrator's authority to issue uniform effluent limitations, as well as the related question of EPA's duty to provide variances from those limitations.<sup>5</sup> And NRDC participated as *amicus curiae* in *duPont v. Train*, wherein we urged the Court to uphold EPA's authority to issue uniform BPT regulations. The Court approved that authority on condition that EPA exercise some administrative flexibility in implementing the regulations. 430 U.S. at 128.

Moreover, in a case recently decided by the Fourth Circuit, NRDC raised precisely the issue presented by the government's petition to this Court: whether EPA's BPT variance provision must include consideration of a discharger's "economic capability," i.e., its ability to afford the costs of installing and

<sup>4</sup> The effluent limitations established pursuant to Section 301 are applied to individual dischargers by means of the permit system established under Section 402 of the Act, 33 U.S.C. § 1342, and designated the National Pollutant Discharge Elimination System ("NPDES"). Under NPDES, the Administrator, or a State official pursuant to a federally approved state program, may issue permits for discharges of pollutants on condition that the discharges will meet all applicable requirements of the Act, including those under Sections 301, 302, 304, and 307. *Id.*

<sup>5</sup> *CPC International Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975); *American Meat Institute v. EPA*, 526 F.2d 442 (7th Cir. 1975); *American Iron & Steel Institute v. EPA*, 526 F.2d 1027 (3d Cir. 1975); *E. I. duPont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1976) and 541 F.2d 1018 (4th Cir. 1976); *Tanner's Council of America Inc. v. Train*, 541 F.2d 1188 (4th Cir. 1976); *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976); *Hooker Chemicals & Plastics Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976); *American Frozen Food Institute v. Train*, 539 F.2d 107 (D.C. Cir. 1976); *American Paper Institute v. Train*, 543 F.2d 328 (D.C. Cir. 1976); *American Petroleum Institute v. Train* 526 F.2d 1343 (10th Cir. 1975) and 540 F.2d 1023 (10th Cir. 1976).

operating BPT. *Appalachian Power Company v. Train*, Nos. 74-2096, *et al.* (4th Cir. April 28, 1980) ("*Appalachian Power* [1980]").<sup>6</sup> The case came before the court on petitions filed by NRDC and numerous power companies for review of the Administrator's actions on remand in *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976) ("*Appalachian Power* [1976]"). In *Appalachian Power* [1976], the court ordered EPA to expand the BPT variance by adding the factors specified in Section 301(c) of the Act. 545 F.2d at 1359-60. NRDC filed its petition in *Appalachian Power* [1980] to contest the Administrator's failure to consider events arising after the 1976 remand which, in our view, demonstrated the error in the Fourth Circuit's rationale. These events included this Court's decision in *duPont* and the D.C. Circuit's decision in *Weyerhaeuser Company v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978). The Fourth Circuit denied NRDC's petition on several grounds.<sup>7</sup>

<sup>6</sup> The Fourth Circuit's opinion in *Appalachian Power* [1980] is set forth as an Appendix to this brief.

<sup>7</sup> NRDC intends to file a petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit on the basis of *Appalachian Power* [1980]. If it is granted, we intend to request that the case be reviewed together with the two cases now before the Court. We will urge the Court to consolidate these three cases for several reasons.

First, the Fourth Circuit rejected NRDC's position on the specific question presented here. We contended that *Appalachian Power* [1976] was no longer good law—in light of this Court's subsequent decision in *duPont* and the D.C. Circuit's decision in *Weyerhaeuser*—to the extent it required EPA to include Section 301(c) in the BPT variance. The court "declined to change [its] *Appalachian Power* variance holding." (App. at 12a). In so doing, the court implicitly rejected NRDC's argument, set forth at 28-32, *infra*, that the Act and *duPont* preclude consideration of Section 301(c) in BPT variance decisions. That argument was neither raised nor considered in the two cases before this Court.

Second, *Appalachian Power* [1980] presents an important issue of first impression that has significance for the administration of the Clean Water Act. NRDC contended that Section 301(1) of the Act,

(footnote continues)

Finally, NRDC and its members have a strong interest in the outcome of this case because we believe the decision below would seriously delay the progress toward clean water that Congress envisioned when it prescribed a uniform, technology forcing regulatory scheme. Congress has enacted precise, comprehensive legislation to require expeditious abatement of industrial pollution. Twice within a span of five years, Congress has considered amendments to the federal law of water pollution control, and each time has examined carefully the manner in which this progress is being achieved. As a result, the Act explicitly provides avenues for relief from many of its requirements and deadlines. But the Act contains no indication of Congressional intent to deviate from this Court's holding in *duPont* that uniform BPT limitations, with only limited variations, must serve as the foundation for industrial pollution abatement. The decisions below threaten to undermine that foundation—in terms of both the degree of pollution control required and the protracted permit proceedings that will be necessary—to the detriment of NRDC's members who enjoy and depend on the Nation's aquatic resources.

(footnote continued)

which prohibits any modification of effluent limitations that apply to toxic pollutants, narrows the circumstances in which EPA may grant BPT variances. The court held that Section 301(1) "does not apply to BPT variances." (App. at 14a).

Third, all three decisions affect the scope of EPA's uniform BPT variance clause even though each case pertains to only one industrial category. In the interests of judicial economy and efficient administration of the Clean Water Act, we believe the Court should resolve all pertinent issues, for all categories, in one decision.

Finally, *Appalachian Power* [1980] creates clear conflicts, both within the Fourth Circuit and between that circuit and the D.C. Court of Appeals. Contrary to *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 245 (4th Cir. 1979), and *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1041-44 (D.C. Cir. 1978), the court indicated in *Appalachian Power* [1980] that it disapproved of EPA's position that "[r]eceiving water quality simply cannot legally be considered a relevant factor in evaluating a variance request." (App. at 11a-12a).

This *amicus* brief is filed with the consent of the parties to this case. Copies of the letters of consent are filed herewith.

## QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency is required, or even permitted, to consider the economic factor specified in Section 301(c) of the Clean Water Act, 33 U.S.C. § 1311(c), in deciding applications for variances from uniform BPT effluent limitations promulgated pursuant to Sections 301(b)(1)(A) and 304(b)(1) of the Act, 33 U.S.C. §§ 1311(b)(1)(A), 1314(b)(1).

## STATEMENT OF THE CASE

### I. The Limits of the Question Presented.

The government's petition asks whether the BPT variance provision must provide for consideration of a discharger's economic capability—under Section 301(c) or otherwise. *Amicus* NRDC poses a question that in one aspect is somewhat narrower, since it asks only whether the economic factor specified in Section 301(c) need be considered in determining variances from BPT. We believe the broader question raised by the government is not properly before this Court because it was not decided below. See *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

In both decisions below, the court remanded EPA's variance provision for compliance with *Appalachian Power* [1976]. See *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111, 124 (4th Cir. 1979); *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 244 (4th Cir. 1979). That 1976 decision required EPA to include in its BPT variance clause the statutory factors set out in Sections 301(c) and 304(b)(1)(B) of the Act. 545 F.2d at 1359-60.



With respect to consideration of a particular discharger's economic capability, *Appalachian Power* [1976] relied entirely on the opinion that Section 301(c) must be applied to BPT as well as to BAT. After discussing the relevance of Section 301(c) to BAT limitations, the court stated: "[I]f such factors as the economic capacity of the owner or operator of a particular point source is relevant in determining whether a variance from the 1983 standards should be permitted, they should be equally relevant when applied to the less stringent 1977 standards . . . ." 545 F.2d at 1359. Nothing in *Appalachian Power* [1976] or the two cases now before this Court suggests any alternative rationale for including economic hardship among the variance factors. Indeed, the lower court has recognized, without further comment, that EPA's variance clause now complies with *Appalachian Power* [1976] insofar as it requires consideration of the factors set forth in Section 304(b)(1)(B). *National Crushed Stone*, 601 F.2d at 123.

In contrast, the broad question framed by the government has been raised in two other cases. The D.C. Circuit has decided that the BPT variance provision need not include consideration of economic capability. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978). The court held that while the Section 304(b)(1)(B) factors include a cost-effectiveness test, they do not require EPA to consider whether an individual discharger can afford the costs of BPT. *Id.* at 1035-36.

The second case raising the government's broad question is *Appalachian Power* [1980], discussed above. There, the parties briefed and argued this question before the Fourth Circuit for the first time. In particular, the briefs raised questions as to whether the term "practicable" in Section 301(b)(1)(A) and the concept of "total cost" in Section 304(b)(1)(B) imply a duty to consider economic hardship quite apart from Section 301(c). In its recent decision, the court did not address these issues.

Consequently, no question is properly before this Court except whether the factors specified in Section 301(c) should apply to BPT variances.

In another aspect, however, the question NRDC presents is broader than that raised by the government. The government asks only whether economic considerations are a *mandatory* component of the BPT variance provision. NRDC believes that a legitimate subsidiary question is whether the Administrator is even *permitted* to consider the economic factors, specified in Section 301(c), in deciding BPT variances. As discussed below,<sup>8</sup> we believe the Act and *duPont* preclude consideration of affordability in BPT variance decisions.

## II. The Context and Implications of the Case.<sup>9</sup>

This case calls upon the Court to interpret and apply the Clean Water Act of 1977, 33 U.S.C. §§ 1251, *et seq.*, in light of its legislative history. The linchpin of this Act is its absolute prohibition against pollutant discharges that fail to meet certain minimum standards. 33 U.S.C. § 1311(a). For existing industrial point sources, those standards require progress toward the elimination of pollutant discharges in two distinct stages.

At the first stage, point sources were required to reduce their discharges by 1977 to a level which can be achieved through application of the "best practicable control technology currently available" (BPT). Clean Water Act § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A). BPT limitations are in-

<sup>8</sup> See discussion at 28-32, *infra*.

<sup>9</sup> The government's statement describes adequately the procedural background of this case and the Court of Appeals' decision under review here. However, Amicus NRDC believes it is imperative that the Court appreciate the broader context in which this issue arises, as well as the differences in the reasoning employed by the courts which have addressed the issue, and the important practical implications of the decisions below. NRDC's statement summarizes these aspects of the case.

tended to bring all sources in an industrial category to a single baseline which represents, at a minimum, the "average of the best performers" in that category.<sup>10</sup>

At the second stage, the same sources must upgrade their pollution controls by 1984 to a level which can be achieved through application of the "best available technology economically achievable" (BAT). Clean Water Act, § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A). BAT limitations must ensure "reasonable further progress [beyond the BPT stage] toward the national goal of eliminating the discharge of all pollutants." *Id.* In contrast to the BPT stage, BAT limitations must be pegged, at a minimum, to "the best performer" in any industrial category.<sup>11</sup> Indeed, BAT regulations "*shall require the elimination of discharges of all pollutants if the Administrator finds . . . that such elimination is technologically and economically achievable . . .*" *Id.* (emphasis added).

The Administrator must consider specific statutory factors in developing BPT and BAT regulations. The factors pertaining to BPT are contained in Section 304(b)(1)(B) of the Act. The BAT factors are set forth in Section 304(b)(2)(B). To provide for increased pollution abatement from the first stage to the second, these sets of factors differ in one important respect. At the first stage, EPA must perform a cost-

<sup>10</sup> Remarks of Sen. Muskie explaining the Conference Report on the Federal Water Pollution Control Act Amendments of 1972. 1 *Leg. Hist.* 169-70. The Congressional Research Service of the Library of Congress has published a detailed, two-volume legislative history of the 1972 Act, titled A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93d Cong. 1st Sess., Serial No. 93-1 (Comm. Print 1973). Citations to this compilation of the legislative history will be: "*Leg. Hist.* —."

<sup>11</sup> 1 *Leg. Hist.* 169-70 (remarks of Sen. Muskie). Of course, if no discharger in a given category is utilizing the "best available" or "best practicable" technology for that category, the Administrator should establish effluent limitations with reference to technologies used in different industries or otherwise demonstrated to be reliable and effective. *Id.*

effectiveness analysis by considering the costs of BPT "in relation to" the effluent reductions that will be achieved. 33 U.S.C. § 1314(b)(1)(B). This is not a true cost-benefit analysis, since EPA need not consider the effect on the quality in a particular water body that is produced by any particular reduction of effluent discharges. *Weyerhaeuser*, 590 F.2d at 1041-44, 1047. At the second stage, the Act envisions much less emphasis on costs. EPA need only "take into account" the cost of achieving BAT. 33 U.S.C. § 1314(b)(2)(B); see *Weyerhaeuser*, 590 F.2d at 1045.<sup>12</sup>

The Act provides for limited variances from both BPT and BAT limitations. Section 301(c) permits the Administrator to modify BAT limitations if the applicant meets two conditions. He must show that less stringent requirements (1) "will represent the maximum use of technology within the economic capability" of that discharger, and (2) "will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. § 1311(c).<sup>13</sup> While the Act is silent regarding variances from BPT, in *duPont* the Court held that at

<sup>12</sup> Senator Muskie explained the consideration of BAT costs as follows:

As to the cost of "best available" technology, the Conferees agreed upon the language of the Senate bill in Section 304(b)(2). While cost should be a factor in the Administrator's judgment, no balancing test will be required. The Administrator will be bound by a test of reasonableness. In this case, the reasonableness of what is "economically achievable" should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of available technology—without regard to cost.

1 *Leg. Hist.* 170 (emphasis added).

<sup>13</sup> As a result of amendments enacted in 1977, the Act also contains a second variance from BAT limitations. Section 301(g)(1) directs the Administrator to modify BAT for certain pollutants if a discharger satisfies three enumerated requirements relating to the environmental effects of the discharge. 33 U.S.C. § 1311(g)(1).

least a limited opportunity for variances must be inferred from the law in order to uphold EPA's authority to issue uniform BPT limitations. 430 U.S. at 128.

The "reasonable further progress" condition in Section 301(c) is meant to assure that BAT requires more pollution control than BPT. This must be true for each source, as well as for whole industrial categories. Under Section 301(c), it is not enough that a discharger show economic inability to meet BAT; he must also show that lesser requirements will ensure progress toward eliminating pollutant discharges. This progress must be toward "zero discharge," *not* toward BAT. The baseline for progress is the BPT requirements to which that source was subject: either the uniform BPT limitations or, if a BPT variance has been obtained, the limitation specified therein. Thus, under the statutory scheme, as elaborated in *duPont*, it is impossible for any source to be subject to more onerous requirements in 1977 than in 1984.

The relationship between uniform BPT limitations and the BPT variance is central to this case. Under *duPont*, BPT limitations must be both uniform and capable of flexible implementation. In determining whether the requirements of *duPont* have been met, one must assess the combined impact of the regulations and the variance provision.

While effluent limitations are published for entire point-source categories, each category is subdivided so that only those sources which are similar will be subject to the same limitations.<sup>14</sup> In this manner, some flexibility is built into the regu-

<sup>14</sup> This Court approved the use of subcategories in *duPont*. After discussing portions of the legislative history that called for ranges of best practicable levels, the Court observed: "if construed to be consistent with . . . what we have found to be the clear statutory language, this language can be fairly read to allow the use of subcategories based on factors such as size, age, and unit processes, with effluent limitations for each subcategory normally based on the performance of the best plants in that subcategory." 430 U.S. at 132 n. 21.

lations themselves by considering technical and other variations among the dischargers to the extent possible in a general rulemaking. The need for case-by-case variations at the permit stage is reduced significantly by the use of subcategories. *Weyerhaeuser*, 590 F.2d at 1040.<sup>15</sup>

EPA's limited variance provision affords additional flexibility. Recognizing that some dischargers might not fit the assumptions upon which EPA based the uniform regulations, the Agency (and this Court in *duPont*) thought it necessary to make some allowance for anomalies at the permit stage.<sup>16</sup>

<sup>15</sup> In *Weyerhaeuser*, for example, the court discussed the relationship between subcategories and variances, noting that both mechanisms contribute toward the minimum flexibility required by *duPont*:

Although the variance must prevent the regulations from having a greater overall impact on an individual mill than the Act authorizes the general regulations to have on the industry, the one designed by EPA . . . accomplishes this goal. Because EPA, in devising the limitations, undertook a meticulous effort to obtain all relevant information from all available sources including the industry itself, and attempted to account for that information in all its diversity, the Agency has built a significant degree of flexibility into the regulations themselves.

Thus, to a great degree, the Agency has accounted for cross-industry, and even "cross-subcategory," differences in establishing the limits. Allowing for variances based on slight or moderate differentials at individual plants would accordingly ignore the liberality that is already built into the system. It would allow for variances when the impact on an individual did not exceed the range of impacts considered by the Agency for the industry generally.

590 F.2d at 140.

<sup>16</sup> The Agency's variance clause is published as a part of each BPT regulation. E.g., 40 C.F.R. §§ 434.22, .32, .42 (coal mining category); 40 C.F.R. §§ 436.33, .43 (mineral mining and processing category). The variance clause provides, in part:

There may be anomalous situations in which data about peculiar conditions at certain plants do not emerge in the general rulemaking. But even when such data are available at the rulemaking stage, limited variances may be necessary to avoid having to establish an inordinate number of subcategories. Rather than sacrifice the uniform nature of the regulations in the name of flexibility, EPA might establish relatively fewer subcategories and rely upon the variance to adjust discharge limits for unusual circumstances.

Nevertheless, the *structure* of EPA's variance provision helps to ensure that the uniformity of the limitations will not fall victim to wholesale variances. A variance may be granted only on the basis of a plant's characteristics which are "fundamentally different" from those EPA considered in the BPT rulemaking. *E.g.*, 40 C.F.R. §§ 436.33, .43 (variance provision for the mineral mining and processing category); see *Weyerhaeuser*, 590 F.2d at 1040. The applicant is permitted to demonstrate, for example, that its cost-effectiveness *ratio* (not its *cost*) is fundamentally different from the ratio EPA calculated for the industry as a whole. Moreover, each applicant for a variance must make at least an initial showing that these fundamental differences exist, and that the cumulative effect of the differences justifies a variance. These burdens on the applicant make it somewhat more difficult at the permit stage to persuade EPA to alter uniform BPT limitations than would be the case at the rulemaking stage. Consequently, dischargers are encouraged to come forward with data prior to the final rulemaking that will facilitate EPA's development of sound, flexible regulations. *Cf. BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979) (problems caused by lack of industry data).

(footnote continued)

In establishing the limitation set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors . . . which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry.

Similarly, the *scope* of the variance—i.e., the factors to be considered—is relevant to determining whether BPT effluent limitations are sufficiently flexible without sacrificing uniformity. Under the Administrator's interpretation, the only anomalies which may be considered in variance applications are those which relate to the generic considerations, or factors, that must be taken into account in the BPT rulemaking. Other kinds of anomalies are irrelevant because they would introduce considerations that are foreign to the concept of BPT. In EPA's parlance, the BPT variance is a "redefinition" of BPT for individual dischargers. See *Withdrawal of Interpretations*, 43 *Fed. Reg.* 50042 (October 26, 1978). Thus, even though modified BPT requirements may be less stringent than uniform BPT limitations, conceptually they must represent BPT for that discharger. *In re Louisiana-Pacific Corp.* 10 ERC 1841, 1851 (Decision of the Administrator, September 15, 1977).<sup>17</sup>

For this reason, the government's petition asks the Court to limit the kinds of anomalies which EPA must consider at the permit stage to those specified in Section 304(b)(1)(B) of the Act. Specifically, the Court must decide whether EPA is required or permitted to consider the factors set forth in Section 301(c) when deciding requests for variances from BPT. In *Weyerhaeuser*, the D.C. Circuit ruled that EPA need not do so with respect to BPT limitations for the paper industry. In the *Appalachian Power* decisions (steam-electric power industry), *National Crushed Stone* (mineral mining industry) and *Consolidation Coal* (coal mining industry), the Fourth Circuit ruled that EPA must.

As noted above, EPA's interpretation of the variance clause can be traced directly to this Court's decision in *duPont*. There, the Court concluded that the Act authorizes EPA to promulgate uniform, single-number effluent limitations for en-

<sup>17</sup> Similarly, the D.C. Circuit pointed out that the Section 301(c) variance permits a case-by-case reassessment of the statutory factors used to establish uniform BAT limitations. See *Weyerhaeuser*, 590 F.2d at 1034-35.



ture categories of point sources. 430 U.S. at 128. The Court found that the Act unambiguously provided this authority with respect to BAT by using the language "for categories and classes of point sources" to describe those limitations. *Id.* at 126-27 (citing 33 U.S.C. § 1311(b)(2)(A)). Congress used different language to describe BPT effluent limitations: "for point sources." 33 U.S.C. § 1311(b)(1)(A). Nevertheless, the Court drew upon the Act's purposes and the Administrator's interpretation of it to uphold the Agency's BPT rulemaking authority "so long as some allowance is made for variations in individual plants . . . ." *Id.* at 128. Thus, rather than requiring EPA to define BPT in each permit, the Court allowed a uniform limitation in the regulations, to be followed by an opportunity for reconsideration of that limitation in those circumstances which warrant variations. The Court believed that it was "premature," however, to consider "whether EPA's variance provision has the proper scope." *Id.* at 128 n.19.<sup>18</sup>

<sup>18</sup> After the Court's decision in *duPont*, the Administrator made it abundantly clear which kinds of fundamental differences may be raised in support of applications for BPT variances. See *in re Louisiana-Pacific Corp.*, 10 ERC 1841 (decision of the Administrator, Sept. 15, 1977); Withdrawal of Interpretations, 43 Fed. Reg. 50042 (Oct. 25, 1978).

The government has suggested that this case presents a substantial ripeness question because the variance clause has not been applied in the context of a specific application. Petition for Writ of Certiorari at 20-22. Amicus NRDC believes the issue in this case is sufficiently clear and proper for review. The question arises as a subsidiary issue within the broader question of whether EPA's BPT regulations for these two categories are valid. As this Court noted in *duPont*, the Administrator's authority to promulgate uniform BPT limitations depends upon a sufficient allowance for flexibility in implementing those regulations. The validity of uniform limitations can be challenged only in the Court of Appeals within 90 days following promulgation (33 U.S.C. § 1369(b)(1)(E)), and if not raised at that time, cannot be addressed in enforcement proceedings. 33 U.S.C. § 1369(b)(2). Thus, as the D.C. Circuit noted in *Weyerhaeuser*, it is necessary as a "threshold" matter to determine whether the uniform BPT limitations are valid under the requirements of *duPont*. 590 F.2d at 1032. That determination, in turn, depends on the flexibility of the variance provision.

The D.C. Circuit and the Fourth Circuit have taken somewhat different approaches toward determining the necessary scope of the variance clause. The D.C. Court confined its inquiry to whether the variance provision was capable of satisfying the purpose for which it was required: to afford the minimum flexibility upon which this Court in *duPont* conditioned EPA's authority to promulgate uniform BPT limitations. *Weyerhaeuser*, 590 F.2d at 1033. Under that standard, the court held that the Administrator need only consider the factors, set forth in Section 304(b)(1)(B) of the Act, which EPA considered in the rulemaking. *Id.* at 1036. Accordingly, if a plant's costs relative to the degree of its effluent reduction are not fundamentally different from those which could have been demanded of the industrial category, a variance need not be granted. *Id.*

The Fourth Circuit agreed that the variance factors "ought ordinarily to be as broad as the factors relied upon in establishing the limitation if the [variance] provision is to have meaning." *Appalachian Power* [1976], 545 F.2d at 1359. However, though economic capability is not one of the factors EPA must consider in setting BPT limitations, the court held that EPA "may not exclude the [§ 301(c)] factors to be considered in granting variances under the [BAT] standards . . . ." *National Crushed Stone*, 601 F.2d at 124. The court noted correctly that "the statute contemplates there be more stringent standards in 1983" than in 1977. *Id.* But the court was of the opinion that the Section 301(c) "economic capability" factor must be considered in granting BPT variances, as well as BAT variances, so as to preserve this pattern of increasing stringency. *Id.*<sup>19</sup>

The potential administrative burdens of the Fourth Circuit's holding are substantial. At present, EPA must process

<sup>19</sup> Consolidation Coal merely adopts this holding and analysis. 604 F.2d at 244. *Appalachian Power* [1980] follows the court's prior decisions without comment. (App. at 12a).



NPDES permit applications from tens of thousands of dischargers. See *duPont*, 430 U.S. at 132.<sup>20</sup> Under the Fourth Circuit's decision, EPA must respond to a plausible showing by any applicant that it cannot absorb BPT compliance costs. The Agency will be compelled to decide whether the discharger would be forced to close, reduce production, forego expansion and modernization, or take other serious measures as a result of BPT requirements. In each case, either the Administrator will have to accept the applicant's representation that such impacts are inevitable, or he will have to undertake his own analysis of the discharger's business judgment to show that they are not.<sup>21</sup>

These proceedings will be complex, costly and cumbersome. EPA's experience with a similar kind of inquiry indicates what can be expected. In 1976, EPA investigated, under Section 507(e) of the Act, a claim by the Ketchikan Pulp Company that economic constraints would force the company

<sup>20</sup> As noted above, EPA intends to provide similar variances from pretreatment standards. See discussion at 3, *supra*, note 3. Pretreatment standards apply to "indirect" dischargers which are not subject to NPDES permit requirements. Nevertheless, EPA will have to conduct variance application proceedings for these dischargers. At least 55,000 such dischargers will be subject to pretreatment standards by 1983, and a substantial number of these could be added to the Agency's existing administrative case load when this variance becomes available. 43 Fed. Reg. 27736 (June 26, 1978).

<sup>21</sup> This shift of the burden of persuasion to EPA will be accompanied by tremendous political pressure on the Agency's permit writers. The D.C. Circuit, for example, was concerned that EPA and state permit writers will be unable to respond effectively to economic variance requests:

A more difficult question surrounds the relevance and importance of economic hardship. The issue is crucial, of course, because those mill operators who are most hard pressed economically will be the most likely to pursue vigorous variance demands. Moreover, when faced with the ultimate threat of economic hardship—plant closure, with attendant unemployment and regional economic dislocation—the local permit-granting agency will find it difficult to resist a plea for a variance.

*Weyerhaeuser*, 590 F.2d at 1036.

to close its pulp mill if BPT limitations were required.<sup>22</sup> The Agency hired several economic consulting firms and conducted extensive discovery of Ketchikan's financial position. Hundreds of thousands of dollars were expended, and the Administrator assigned several enforcement officers, attorneys, engineers and economists to the task for over a year. Even after this effort, the issues were not resolved.

The Ketchikan investigation illustrates, on a small scale, the tremendous administrative difficulties EPA would face under the Fourth Circuit's mandate. Thus, the Court's decision in this case will have a major effect on the efficiency, uniformity and promptness with which the Act is to be administered. In the Argument which follows, we turn to NRDC's principal contention: Congress could not have meant for EPA to shoulder such a burden, or it surely would have stated that intention clearly in the Act.

## SUMMARY OF ARGUMENT

The result reached by the D.C. Circuit in *Weyerhaeuser v. Costle* is correct. There, the court upheld a BPT variance clause which, as interpreted by the Administrator, includes the statutory factors specified in Section 304(b)(1)(B), but excludes consideration of the "economic capability" factor set forth in Section 301(c) of the Act. 590 F.2d at 1039, n.38. This conclusion is supported by two alternative lines of analysis.

<sup>22</sup> Section 507(e) provides, in part, that "[t]he Administrator shall . . . investigat[e] threatened plant closures or reductions in employment allegedly resulting from [effluent] limitations . . ." 33 U.S.C. § 1367(e). Such investigations result only in reports to Congress, not regulatory or enforcement actions. The Ketchikan investigation was the only such proceeding ever undertaken by EPA pursuant to this provision. It produced an extensive record, but was terminated when EPA settled a related enforcement action against the company. See *United States v. Ketchikan Pulp Co.*, 430 F.Supp. 83 (D. Alas. 1977).

First, both the Act and its legislative history demonstrate that Congress made a conscious decision to exclude considerations of economic capability from the calculation of BPT requirements for individual dischargers. At the BPT stage, Congress prescribed a cost-effectiveness test. The Administrator need only assess the costs of BPT in relation to the resulting effluent reductions. He need not consider whether a discharger will be able to afford those costs. This conclusion is underscored by the fact that Congress made the explicit economic escape valve in Section 301(c) applicable only to the more costly BAT limitations, and by Congress' acceptance of the likelihood that BPT limitations would force some plants to close. Moreover, by its terms Section 301(c) requires that a discharger's modified limitations result in "reasonable further progress" *beyond* BPT, a condition which obviously cannot be met in applying Section 301(c) to grant a variance *from* BPT.

Second, as the result in *Weyerhaeuser* demonstrates, the scope of EPA's variance must be consistent with the Act's concept of *uniform* BPT limitations. The Act, as interpreted in *duPont*, authorizes a two-tiered regulatory scheme consisting of uniform BPT effluent limitations followed by opportunities to *reassess* BPT at the permit stage if unusual circumstances are encountered. Thus, the sole purpose of the BPT variance is to reconsider BPT for individual dischargers, and to thereby calculate case-by-case BPT limitations wherever warranted. By analogy, Section 301(c) provides for reconsideration of the BAT factors and, if warranted, modification of the uniform BAT requirements.

With respect to considerations of cost and economic capability, Congress has set forth radically different factors to define BPT and BAT. Accordingly, concepts peculiar to BAT—the Section 301(c) factors—must not be engrafted onto BPT, as the decisions under review require. The Fourth Circuit would require the Agency to do far more than reassess BPT for fundamental differences in statutorily relevant factors; it would require EPA to change the BPT calculus by adding the

statutorily proscribed concept of affordability. Consequently, dischargers which obtain a variance based in part on considerations of affordability, will be permitted to utilize less than the best practicable technology, as defined by Congress. This result is neither required nor permitted by the Act.

## ARGUMENT

### I. The Act Neither Requires Nor Authorizes the Administrator To Consider Modifying BPT Limitations On the Economic Capability Grounds Specified In Section 301(c).

In resolving this case, as in *duPont*, the Court must apply the language of the Clean Water Act and the intentions of the Act's authors. The scheme of the Act is detailed and comprehensive. It prohibits point-source discharges of all pollutants except in compliance with certain uniform standards. 33 U.S.C. § 1311(a). It states the criteria for developing and issuing those standards. It authorizes variances and time extensions for some standards while providing none for others.<sup>23</sup> And where the Act affords relief from uniform standards on the basis of affordability, it states that intention explicitly.<sup>24</sup>

<sup>23</sup> In addition to Sections 301(c) and 301(g)(1), discussed at 11, *supra*, the Act contains a variety of provisions for relief from uniform standards and compliance deadlines. Section 309(a)(5) authorizes extensions of time to comply with BPT effluent limitations. 33 U.S.C. § 1369(a)(5). Section 301(h) allows the Administrator to waive the requirement of Section 301(b)(1)(B) that municipalities install secondary treatment by July 1, 1977 (33 U.S.C. § 1311(h)), and Section 301(i) permits extensions of that deadline for both municipalities and associated indirect dischargers. 33 U.S.C. § 1311(i). BAT effluent limitations must be relaxed for certain "conventional" pollutants in accordance with the cost-effectiveness analysis prescribed by Sections 301(b)(2)(E) and 304(b)(4). 33 U.S.C. §§ 1311(b)(2)(E), 1314(b)(4). And in certain circumstances, uniform pretreatment standards required by Section 307(b) must be eased to the extent that municipalities receiving pre-treated wastes are capable of achieving additional pollutant removal. 33 U.S.C. § 1317(b)(1).

<sup>24</sup> See discussion at 11, *supra*; note 31, *infra*.

In view of the thoroughness of the Act's regulatory scheme and the attention Congress gave to considerations of affordability, special care should be taken to give the Act its literal meaning. Recognition must be given the Act's omissions as well as its commands. As this Court observed in a similar context, "[t]he question . . . is what Congress intended for *these* regulations." *duPont*, 430 U.S. at 138 (emphasis in the original).<sup>25</sup> If Congress intended that EPA would consider economic hardship in granting variances from these regulations, it surely would have provided that authority in the Act.

In *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), the Court outlined the proper analysis for this case. There, the Court considered whether the Administrator, in approving state implementation plans under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, may consider the technological and economic feasibility of meeting the plans' requirements. 427 U.S. at 256. The Court noted the "technology-forcing character" of the statute's requirements for state plans, and held that the eight criteria Congress had specifically set forth in Section 110(a)(2) were the only factors the Administrator could consider in assessing such plans. *Id.* at 257. The Court stated: "[I]f a basis is to be found for allowing the Administrator to consider such claims [of infeasibility], it must be among the eight criteria . . ." *Id.*

It was urged that one of these criteria—requiring that various standards be met as expeditiously as "practicable" or

<sup>25</sup> The quoted passage comes from that portion of *duPont* in which the Court rejected any variance from the uniform "standards of performance" for new sources that are required by Section 306 of the Act. The Court of Appeals had ordered EPA to "come forward with some limited escape mechanism for new sources," reasoning that "[p]rovisions for variances, modifications and exceptions are appropriate to the regulatory process." *E. I. duPont de Nemours v. Train*, 541 F.2d 1018, 1028 (4th Cir. 1976). In rejecting the Fourth Circuit's rationale, the Court stressed that Congress' intentions must be the basis for decision. The Court should be guided by the same principle here.

within a "reasonable" time—provided the basis for considering feasibility. *Id.* at 257-58. Carefully analyzing the statute and its history, the Court disagreed. *Id.* Most important, the Court supported its conclusion by observing that "[w]here Congress intended the Administrator to be concerned about economic and technological feasibility, it expressly so provided." *Id.* at 257, n. 5. Since section 110(a)(2) contained no such language, the Court held that "claims of economic or technological infeasibility may not be considered by the Administrator." *Id.* at 265.

Similarly, the Clean Water Act contains no authority—either directly or, as in *duPont*, by implication—for the Administrator to modify BPT in response to claims of economic hardship. With respect to technology based controls, the Act's only variance for economic hardship is Section 301(c), which applies exclusively to BAT limitations. The Administrator has fashioned the BPT variance provision as a "limited"<sup>26</sup> variance which serves only to afford minimum flexibility in implementing the BPT regulations, as required by *duPont*. As such, the variance excludes economic considerations, and should not be expanded unless the Court finds overwhelming reasons to do so.

Congress could not have been clearer that Section 301(c)'s economic capability test applies only to BAT. Section 301(c) states: "[t]he Administrator may modify the requirements of subsection (b)(2)(A) of this Section . . ." 33 U.S.C. § 1311(c); see *duPont*, 430 U.S. at 121.<sup>27</sup> Moreover, Section

<sup>26</sup> See *duPont*, 430 U.S. at 124. Similarly, in *Weyerhaeuser* the D.C. Court of Appeals stressed that a narrowly defined variance provision "assures that the pin-hole safety valve envisioned in the Act and *duPont* does not become a yawning loophole." 590 F.2d at 1040.

<sup>27</sup> NRDC contends that this language is dispositive with respect to the specific issue raised in this case. Where Congress speaks explicitly in one context but is silent in another where it might have acted in similar fashion, courts properly give considerable weight to

(footnote continues)

301(c) does not apply *at all* until *after* the BPT compliance deadline of July 1, 1977. *Id.* Finally, one condition of Section 301(c) is that even the discharger's modified BAT limitations will result in "reasonable further progress" toward the elimination of pollutant discharges. *Id.* This "further" progress must go beyond the *initial* progress required by BPT limitations.<sup>28</sup> Applying Section 301(c) to BPT would require the impossible result that a variance from a standard must assure progress beyond the standard itself.

Congress' statutory plan is sensible and internally consistent. It is not surprising that the Act provides an economic capability variance for BAT but authorizes none for BPT. Congress considered BPT to be within the reach of all but the marginal plants, and decided that if a source could not afford even BPT, it should close.<sup>29</sup> BAT, however, is expected to be more onerous than BPT.<sup>30</sup> Congress therefore afforded case-by-case relief for those dischargers which had achieved the BPT

(footnote continued)

that silence in ascertaining the legislative intent. Congress should be deemed to have decided that similar circumstances do not warrant the same treatment. *Union Electric*, 427 U.S. at 257. This rule should apply with special force where, as here, Congress has carefully developed a comprehensive and detailed statutory scheme.

<sup>28</sup> The remarks of Congressman Jones, Chairman of the House Conferees on the 1972 amendments, leave no doubt that recipients of Section 301(c) variances must demonstrate progress *beyond* the BPT baseline: "This provision in section 301(c) authorizes a case-by-case evaluation of any modification to the July 1, 1983, requirements . . . . This provision is not intended to justify modifications which would not represent an *upgrading over the July 1, 1977 requirements of [BPT]*." 1 *Leg. Hist.* 232 (emphasis added).

<sup>29</sup> See discussion at 26-27, *infra*.

<sup>30</sup> See discussion at 10, *supra*.

baseline, but which encountered great economic hardship in going further.<sup>31</sup>

The Act's legislative history amply supports this view. The Conference Report left no doubt that EPA may consider economic hardship under Section 301(c) only at the BAT stage:

The conferees intend that the Administrator . . . will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on [BAT]. The burden will be on him to show that modified requirements will represent the maximum use of technology within his economic capability and will result in reasonable further progress toward the elimination of the discharge of pollutants.

1 *Leg. Hist.* 304. Moreover, in addition to limiting Section 301(c) to BAT, this passage demonstrates that Congress refused to give the Administrator *any* responsibility to assess the economic impacts of BPT on individual plants. After quoting this language from the Conference Report, Congressman Dingell restated it in even stronger terms: "Thus, a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, it should be avoided." 1 *Leg. Hist.* 255. Senator Muskie<sup>32</sup> agreed, noting

<sup>31</sup> Similarly, Congress authorized economic variances from the "water quality related effluent limitations" called for in Section 302 of the Act. 33 U.S.C. § 1312. These limitations are intended to be even more protective than BAT. A person affected by the Section 302 limitations may have these requirements adjusted where it is shown that "there is no reasonable relationship between the economic and social costs and the benefits to be obtained." *Id.*

<sup>32</sup> As this Court observed in *duPont*, Senator Muskie was the primary author of the 1972 amendments to the Federal Water Pollution Control Act. See *duPont*, 430 U.S. at 129.



that the Conferees specifically decided "to avoid imposing on the Administrator *any* requirement to . . . determine the economic impact of [BPT] controls on any individual plant in a single community." *Id.* at 170. (emphasis added).

The Fourth Circuit's error is not mitigated by the fact that the holding requires EPA merely to *consider* an applicant's economic analysis together with other facts.<sup>33</sup> Since Congress *singled out* economic hardship as the primary factor to be excluded from the determination of individual BPT requirements, EPA may not consider that factor. *See Union Electric*, 427 U.S. at 265. As discussed above,<sup>34</sup> the Fourth Circuit's position will, as a practical matter, compel EPA to do what Congress forbade.

The conclusion that BPT has no economic escape valve is underscored by Congress' awareness that the consequences of BPT might be severe. Congress was determined to establish a

<sup>33</sup> The result in *United States v. Chevron Oil Co.*, 583 F.2d 1357 (5th Cir. 1978), illustrates how EPA will be compelled to do much more than "consider" an applicant's analysis. That case involved the government's attempt to enforce a civil penalty that had been assessed against Chevron by the U.S. Coast Guard under Section 311 of the Act in connection with an oil spill. Under Section 311 (as it appeared at the time of Chevron's spill), liability for the penalty arises whenever oil is discharged in excess of the "harmful quantity" established by the President. 33 U.S.C. §§ 1321(b)(3), (b)(6). Exercising this authority, the President had established a uniform harmful quantity as that amount which, "at all times and locations and under all circumstances and conditions," will cause "a film or sheen upon or discoloration of the surface of the water." *See Chevron*, 583 F.2d at 1360.

At an administrative proceeding before the Coast Guard, Chevron introduced evidence that its spill, while violating the government's "sheen test," nevertheless was not harmful under the circumstances of the incident. The government offered no contradictory evidence. The Fifth Circuit held that the government cannot rest on its uniform standard, but "must rebut with evidence that defendant's spill was of a harmful quantity under the circumstances." *Id.* at 1364.

<sup>34</sup> *See* discussion at 17-19, *supra*.

uniform baseline for industrial dischargers that necessarily would force some marginal plants to cease operations. Such plant closure was a price that needed to be paid to clean up the Nation's waters. *See Weyerhaeuser* 590 F.2d at 1036-37 (citing remarks by Rep. Jones and Sen. Bentsen); *cf. Union Electric*, 427 U.S. at 270 (concurring opinion of the Chief Justice and Justice Powell). Plant closings would not be widespread because BPT was intended to represent only an interim step toward requiring the very best technology. Consequently, no further consideration of a discharger's economic capability was needed at the BPT stage.

Thus, the Act and its history demonstrate that the Fourth Circuit's incorporation of Section 301(c) into the BPT variance is inconsistent with Congress' intent. In addition, the lower court's rationale is flawed by a fundamental misunderstanding of the Act.

First, the court based its conclusion on the observation that "the statute contemplates there may be more stringent standards for 1983." *National Crushed Stone*, 601 F.2d at 124. This interpretation of the statute is correct as a general proposition. But the court erred in concluding that the BPT and BAT variances both must include economic capability in order to accomplish the Act's purposes. It is the *differences* between BPT and BAT—not an identity of variance factors—that fulfills Congress' desire for systematic progress toward elimination of pollutant discharges.<sup>35</sup> Foremost among these differences is the requirement that BAT represent "reasonable further progress"

<sup>35</sup> These statutory distinctions between BPT and BAT are discussed at 9-11, *supra*. In addition, the Act includes a variety of other ways to bring about Congress' ultimate goal of eliminating the discharge of pollutants. The Act contemplates that water quality standards under Section 303 will be strengthened every three years; authorizes extremely stringent controls under Section 302; and provides for toxic effluent standards or prohibitions under Section 307(a) from which no variances are available.



beyond BPT—a requirement found in Section 304(b)(2)(B) and reinforced by Section 301(c) itself.<sup>36</sup>

Second, the Court believed that without an economic capability test in the BPT variance, EPA's regulations "could easily close a plant in 1979 which would be allowed to operate under a variance in 1983." *Id.* This is not true. As explained above, Section 301(c) does not permit EPA to relax BAT to a level that is less stringent than BPT.<sup>37</sup> Indeed, it provides that modified BAT requirements must require progress beyond BPT. Any plant that closes in 1977 because it cannot afford the cost of BPT must necessarily remain closed after 1984, since BAT, even as modified under Section 301(c), may not be less stringent and (barring cost-reducing innovations) less costly than BPT.

## II. The Scope of the Variance Required Below Is Precluded By the Act and The Rationale of *duPont*.

The foregoing analysis shows that Congress did not require or even authorize EPA to include the economic capability factor of Section 301(c) in the BPT variance provision. In addition, NRDC contends that the Act, as construed in *duPont*, precludes such consideration.

In *duPont*, this Court required a variance provision for only one reason: to permit the application of BPT to individual

<sup>36</sup> For this reason, BPT and BAT limitations for a given industrial subcategory ordinarily will not be identical—the situation which primarily concerned the court in *National Crushed Stone*. 601 F.2d at 124. EPA may occasionally promulgate identical BPT and BAT, but such situations are not necessarily inconsistent with the Act. If the Administrator applies the BAT factors and legitimately determines that "further progress" for an industry would not be "reasonable," BAT limitations may be identical to BPT. The Act does not require, or even suggest, that EPA downgrade BPT in these circumstances merely to preserve some room for progress at the next stage.

<sup>37</sup> See discussion at 12, *supra*. As a result, if BPT and BAT are identical for an industrial category, no modification would be available under Section 301(c).

dischargers in a manner sufficiently flexible to justify the issuance of uniform regulations. 430 U.S. at 128. In the face of somewhat ambiguous statutory language,<sup>38</sup> the Court's insistence on a two-tiered regulatory scheme represents a compromise of sorts between absolute, uniform limitations and case-by-case BPT requirements.<sup>39</sup> This balance was struck on the basis of the Act's purposes, the Administrator's interpretation of the Act and, in part, on the analogy afforded by the Section 301(c) variance pertaining to BAT. *Id.* at 127-28, 134-35.

If uniformity is to be maintained as *duPont* indicates, the scope of the BPT variance must be no greater than necessary to achieve its purpose. As discussed above,<sup>40</sup> the provision's purpose is to recalculate BPT for an individual discharger, taking into account any anomalies which set that discharger apart from the rest of the industrial category. A discharger's permit requirements, derived through the BPT variance process, must still represent BPT for that discharger. Accordingly, the scope of the variance must accomplish that result and no more. If economic capability is considered for an individual discharger—while the same consideration is excluded for the industry as a whole—the BPT variance will become a license for any marginal plant to avoid BPT.

The D.C. Circuit adopted this reasoning in *Weyerhaeuser*. There, the Court stressed that the Act's emphasis on uniformity, within the bounds set by *duPont*, would necessarily force the

<sup>38</sup> See discussion at 16, *supra*.

<sup>39</sup> The petitioners in *duPont* sought a ruling that BPT limitations must be established at the permit stage. There is no suggestion in *duPont* that the Court would have approved the notion of considering economic hardship in BPT permit proceedings if it had decided against uniform limitations. Quite the contrary, the Court noted that the Senate Report contemplated that only the Section 304(b)(1)(B) factors should be considered at the permit stage. 430 U.S. at 132 n. 21.

<sup>40</sup> See discussion at 15, 17, *supra*.

closure of marginal plants. This result, the court thought, could not be changed by the BPT variance clause:

[T]he Act's supporters in both Houses acknowledged and accepted the possibility that its 1977 requirements might cause individual plants to go out of business. They self-consciously made the legislative determination that the health and safety gains that achievement of the Act's aspirations would bring to future generations will in some cases outweigh the economic dislocation it causes to the present generation. They accordingly authorized EPA to impose effluent restrictions that they knew might shut down parts of regulated industries . . . . The Agency, in turn, has projected that its limitations for the paper industry may shut down eight marginal mills . . . , and *the variance provision need not protect these or other individuals from impacts authorized for the industry as a whole.*

590 F.2d at 1036-37 (emphasis added) (citations omitted).

Accordingly, the court in *Weyerhaeuser* interpreted *duPont*'s "flexibility" standard as requiring that the BPT variance be "analogous" to the statutory variance contained in Section 301(c). 590 F.2d at 1034. *Weyerhaeuser* holds that under *duPont* the BPT variance factors need only reflect the factors used to establish BPT limitations. With respect to costs, the BPT variance is legally sufficient if it provides for the cost-effectiveness test set forth in Section 304(b)(1)(B), just as Section 301(c), by analogy, includes the economic capability test used to develop BAT. *Id.* at 1035-36.<sup>41</sup> This formulation,

<sup>41</sup> The result in *Weyerhaeuser* is supported by the Senate Report on the 1972 amendments:

In determining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include [those listed in Section 304(b)(1)(B)] . . . . In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant.

<sup>2</sup> *Leg. Hist.* 1468.

together with the requirement that differences regarding the BPT factors be "fundamental," ensures that the uniformity of the regulations will not be undermined. *Id.* at 1039-40.

The Seventh Circuit's holding in *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977), also is instructive. There, U.S. Steel petitioned for review of EPA's order issuing an NPDES permit to the Company's Gary Works. Earlier, in *American Iron & Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975), the Third Circuit had remanded BPT limitations for the steel industry because of the Agency's failure to establish ranges of effluent reductions. For this reason, the Administrator had sought additional data in order to develop an individual BPT permit for the Gary Works. In *United States Steel*, noting that this Court in *duPont* had approved the use of single-number effluent limitations instead of ranges, the Seventh Circuit said that EPA should have treated the proceeding as a variance application. 556 F.2d at 844. Nevertheless, the court held that EPA's process was the functional equivalent of applying the BPT variance clause:

The agency's reexamination of the BPT issue as if it were obligated to determine BPT for the Gary Works individually was the equivalent of determining whether there were fundamentally different factors at that plant which made BPT impracticable there and thus justified a variance from nationally applicable limitations based on BPT.

*Id.* at 845. Thus, while not addressing the "fundamentality" requirement or the applicant's burden of proof, the court did indicate that a BPT variance amounts to recalculating BPT for an individual discharger using the same factors that are relevant to developing uniform BPT limitations.

*Weyerhaeuser* goes as far as the Act and *duPont* permit. The inclusion of extraneous factors in the variance would require EPA to consider excusing a discharger from using the

best practicable technology that is available under the circumstances. It would result in permit requirements which, both conceptually and in a very real sense, are less protective than BPT. As the D.C. Court feared, EPA's variance would become "a license for avoidance of the Act's strict pollution abatement requirements." *Weyerhaeuser* 590 F.2d at 1035. For this reason, the Fourth Circuit's result is contrary to the rationale of *duPont* and flagrantly inconsistent with the Act.

## CONCLUSION

By requiring EPA to consider the economic capability factor of Section 301(c) in deciding applications for variances from BPT effluent limitations, the decisions below are inconsistent with the Clean Water Act and this Court's holding in *duPont*. The Act neither requires nor authorizes such considerations. Indeed, as interpreted in *duPont*, the Act precludes consideration of affordability in BPT variance proceedings. If any remnant of the uniformity of BPT limitations is to remain, as authorized by *duPont*, the scope of the Agency's variance clause must be confined to those factors used to develop the BPT regulations. The BPT factors, specified in Section 304(b)(1)(B) of the Act, do not include economic capability.

Accordingly, the Court should uphold the Agency's BPT variance clause, and reverse the judgments below on this issue.

Respectfully submitted,

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May 14, 1980

## APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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Nos. 74-2096, 74-2188, 74-2196,  
74-2236, 74-2263, 74-2264,  
74-2265, 74-2268, 74-2269,  
74-2270, 74-2286, 74-2298,  
74-2312, 74-2313, 74-2315,  
74-2339, 74-2340, 74-2341,  
74-2343, 74-2365, 74-2366,  
74-2396, 75-1014, 75-1020,  
75-1021, 75-1022, 75-1047,  
75-1074, 75-1078, 75-1091,  
75-1094, 75-1095, 75-1198,  
75-1199, 75-1200, 75-1201,  
75-1202, 75-1203, 75-1223,  
75-1255, 75-1345, 75-1346,  
75-1347, 78-1701, 78-1878,  
78-1902

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APPALACHIAN POWER COMPANY, BALTIMORE GAS  
AND ELECTRIC COMPANY, CAROLINA POWER &  
LIGHT COMPANY, DUKE POWER COMPANY,  
MONONGAHELA POWER COMPANY, OHIO POWER  
COMPANY, POTOMAC EDISON COMPANY, POTOMAC  
ELECTRIC POWER COMPANY, SOUTH CAROLINA  
ELECTRIC & GAS COMPANY, VIRGINIA ELECTRIC  
AND POWER COMPANY, WEST PENN POWER COMPANY

*Petitioners*

v.

RUSSELL E. TRAIN, as Administrator  
ENVIRONMENTAL PROTECTION AGENCY

*Respondent*

ALABAMA POWER COMPANY, *et al.*

JERSEY CENTRAL POWER & LIGHT COMPANY,  
METROPOLITAN EDISON COMPANY and  
PENNSYLVANIA ELECTRIC COMPANY

*Intervenors*

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**ON PETITIONS FOR REVIEW OF ACTIONS OF THE  
ADMINISTRATOR OF THE ENVIRONMENTAL  
PROTECTION AGENCY\***

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Argued: April 4, 1979      Decided: April 28, 1980

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Before BREITENSTEIN,\*\* Senior Circuit Judge,  
WIDENER and PHILLIPS, Circuit Judges.

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\* The following Petitions for Review, all naming Train as Respondent, were consolidated:

74-2188 — National Rural Electric Cooperative Association  
74-2196 — Georgia Power Company  
74-2236 — Tampa Electric Company  
74-2263 — Indiana & Michigan Electric Company  
74-2264 — Indiana-Kentucky Electric Corporation  
74-2265 — Illinois Power Company  
74-2268 — Pacific Gas and Electric Company  
74-2269 — San Diego Gas & Electric Company  
74-2270 — Southern California Edison Company, a California corporation  
74-2286 — Mississippi Power Company  
74-2298 — Arkansas Power & Light Company and Arkansas-Missouri Power Company  
74-2312 — Gulf Power Company  
74-2313 — Alabama Power Company  
74-2315 — Boston Edison Company, Holyoke Water Power Company, Nontaup Electric Company, New England Power Company, Public Service Company of New Hampshire, Western Massachusetts Electric Company  
74-2339 — Consolidated Edison Company of New York, Inc.

74-2340 — Pennsylvania Power & Light Company  
74-2341 — Philadelphia Electric Company  
74-2343 — Florida Power & Light Company  
74-2365 — Dairyland Power Cooperative  
74-2366 — Commonwealth Edison Company  
74-2396 — Mississippi Power & Light Company, Louisiana Power & Light Company, and New Orleans Public Service, Inc.  
75-1014 — Western Farmers Electric Cooperative, a corporation  
75-1020 — Alabama Electric Cooperative, Inc.  
75-1021 — Buckeye Power, Inc., Indiana and Michigan Power Company, Kentucky Power Company, Ohio Electric Company, Ohio Power Company, Ohio Valley Electric Corporation  
75-1022 — Brazos Electric Power Cooperative, Inc.  
75-1047 — Connecticut Light & Power Company, The Hartford Electric Light Company, Western Massachusetts Electric Company, Long Island Lighting Company, New York State Electric & Gas Corporation (Intervenors)  
75-1074 — Corn Belt Power Cooperative  
75-1078 — Texas Utilities Generating Company, Dallas Power & Light Company, Texas Electric Service Company, Texas Power & Light Company  
75-1091 — Public Service Electric & Gas Company  
75-1094 — Union Electric Company  
75-1095 — Central Iowa Power Cooperative  
75-1198 — South Texas Electric Cooperative, Inc.  
75-1199 — Central Power & Light Company and West Texas Utilities Company  
75-1200 — State of Texas  
75-1201 — Houston Lighting & Power Company  
75-1202 — Tennessee Valley Authority  
75-1203 — Brazos River Authority



- 75-1223 — Cincinnati Gas & Electric Company, Cleveland Electric Illuminating Company, Columbus & Southern Ohio Electric Company, Dayton Power & Light Company, Ohio Edison Company, Toledo Edison Company
- 75-1255 — Union Electric Company, a Missouri Corporation
- 75-1345 — Platte River Power Authority
- 75-1346 — City of Lamar, a municipal corporation of the State of Colorado, and The Lamar Utilities Board
- 75-1347 — Tri-State Generation and Transmission Association, Inc.
- 78-1902 — Appalachian Power Company, et al
- 78-1878 — Natural Resources Defense Council, Inc.
- 78-1902 — Natural Resources Defense Council, Inc.

**\*\*** Honorable Jean S. Breitenstein, United States Circuit Judge for the Tenth Circuit, sitting by designation.

#### WIDENER, Circuit Judge:

These actions arise because of EPA amending its regulations to comply with our mandate in *Appalachian Power Co. v. Train*, 545 F.2d 1351 (1976). In *Appalachian Power*, approximately seventy power companies sought review of the Environmental Protection Agency's (EPA) regulations promulgated under authority of the Federal Water Pollution Control Act (Act).<sup>1</sup> The power companies now challenge EPA's amendments to parts of 40 CFR Part 423<sup>2</sup> on grounds that they do not fully comply with *Appalachian Power*. Part 423 sets out the best practicable technology (BPT) limitation standards for the steam electric power industry. Natural Resources Defense

Council (NRDC), through its petitions, also seeks a review of certain EPA BPT regulations, not on the ground that *Appalachian Power* has not been complied with but on the ground that § 301(1), 33 USC § 1311(1), a 1977 amendment to the Act, prohibits EPA from modifying any of § 301, 33 USC § 1311, including BPT limitations, for toxic pollutants. It also challenges the EPA variance amendments on the ground that they did comply with *Appalachian Power* so far as the factors in § 301(c) are referred to in the amended regulations.

In 1972, Congress passed the Federal Water Pollution Control Act (Act) with an ultimate goal of no pollutant discharges into our nation's waters. Toward that ultimate goal, Congress established increasingly stringent standards of pollution control. Phase I of the Act sets best practicable technology (BPT) limitations to go into effect in 1977.<sup>3</sup> In 1983, best available technology (BAT) limitation standards are to go into effect.<sup>4</sup> Several parts of the Act were amended in 1977 but the basic goals and strategies of the Act remain intact. EPA is given broad power under the Act so that it may insure that the phases of improvement can be achieved. In order to carry out its obligation, EPA promulgated regulations setting single number effluent limitations for various industries in order to commence the achievement of the goal of the statute. In *duPont*, we held that EPA had the authority to promulgate such effluent limitations which are to be considered presumptively applicable. *E. I. duPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1028 (4th Cir. 1976), *aff'd* on this point 430 U.S. 112 (1977). Through the regulations, applicable unless rebutted, EPA hopes to achieve national uniformity as the goal of no discharge of pollutants is sought. *Id.* at 1028.

*Appalachian Power* involved a review of many of EPA's regulations promulgated to aid in the application and enforcement of the Act. Only our holding dealing with BPT variance regulations is pertinent to our decision here. Among other

<sup>1</sup> 33 USC § 1251 *et seq.*

<sup>2</sup> Specifically amended were 40 CFR 423.12(a), 423.22(a), 423.32(a) and 423.42.

<sup>3</sup> § 301(b)(1)(A), 33 USC § 1311(b)(1)(A).

<sup>4</sup> § 301(b)(2)(A), 33 USC § 1311(b)(2)(A).

provisions under attack in *Appalachian Power* was EPA's variance clause providing that a variance from the 1977 standards set out in the regulations would be granted when "the factors relating to equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from those factors considered in establishing the guidelines."<sup>5</sup> Costs were excluded from consideration by EPA's interpretation of its own regulation. We struck down the clause because EPA's refusal to consider costs resulted in too restrictive a view of the minimum content of the variance. Under the 1983 standards set out in the Act, for example, costs were to be a relevant factor. Following our decision in *duPont*, we reasoned that the Act contemplated progressively more stringent standards as the country moved closer to the goal of elimination of pollutant discharge. Therefore, the 1977 standards were not intended to be any less flexible than the 1983 standards. As a result, we remanded the regulation to EPA for the agency to come forward with a meaningful variance clause taking into consideration at least the statutory factors set out in §§ 301(c), 33 USC § 1311(c); 304(b)(1)(B), 33 USC § 1314(b)(1)(B); and 306(b)(1)(B), 33 USC § 1316(b)(1)(B).<sup>6</sup> *Appalachian Power* at 1359-60.

<sup>5</sup> § 423.12(a) interpreted at 39 FR 28926-27 (Aug. 2, 1974), 30073 (Aug. 13, 1974).

<sup>6</sup> § 301(c), 33 USC § 1311(c), provides:

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

§ 304(b)(1)(B), 33 USC § 1314(b)(1)(B), provides that such regulation shall:

(footnote continues)

After the Supreme Court's decision in *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), we modified our decision in *Appalachian Power* to exclude the requirement of a variance for new sources, but declined to modify the opinion further.<sup>7</sup> In March 1978, EPA proposed its amendment to the

(footnote continued)

specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

§ 306(b)(1)(B), 33 USC § 1316(b)(1)(B), provides:

As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

<sup>7</sup> No. 74-2096, Order of September 26, 1977.

BPT variance provision. 43 FR 8812-13 (1978). After a comment period, this rule was made final on September 22, 1978. EPA amended 40 CFR Part 423.12(a), 423.22(a), 423.32(a) and 423.42 by adding the following paragraph:

In accordance with the decision in *Appalachian Power*, 545 F.2d 1351, 1358-60 (4th Cir. 1976), EPA's legal interpretation appearing at 30 FR 30073 (1974) shall not apply to this paragraph. The phrase "other such factors" appearing above may include significant cost differentials and the factors listed in section 301(c) of the Act.

43 FR 43025 (Sept. 22, 1978) corrected at 43 FR 44848 (Sept. 29, 1978).

In October 1978, EPA published a notice rescinding its no-cost interpretation of 1974. 43 FR 50042. In October 1978, the utilities filed this action.<sup>8</sup>

The utilities challenge the EPA amendment to the BPT variance provisions, contending that the mandate of *Appalachian Power* has not been met by the addition of "significant cost differentials and the factors listed in section 301(c) of the Act." Specifically, the utilities argue that *Appalachian Power* requires EPA to consider 304(b)(1)(B) factors including "total cost... in relation to effluent reduction benefit."

The utilities concede that the addition of "significant cost differentials and the factors listed in section 301(c) of the Act" to the existing variance provisions on its face could fulfill the *Appalachian* mandate. They argue, however, that EPA has made it clear that effluent reduction benefits are not a relevant factor under the regulation. The utilities urge that EPA's interpretation of effluent reduction benefit is much too narrow

<sup>8</sup> NRDC had filed its original petition on September 28, 1978, in the D.C. Circuit. The utilities and NRDC then filed petitions for review in this court. Upon motion, the D.C. Circuit transferred NRDC's first petition to this court. *NRDC v. EPA*, No. 78-1929 (D.C. Cir. Dec. 21, 1978).

in that it considers only costs in relation to the degree of effluent reduction with no consideration of receiving water quality. Such an interpretation, they urge, is impermissible in light of *Appalachian*.

No variance has been applied for here. Therefore, the utilities' only authority offered to show EPA's application of its newly amended regulations is the February 6, 1979 recommendation of the Assistant Administrator for Water Enforcement of the EPA tentatively turning down Cincinnati Gas and Electric Company's application for a variance for its W. C. Beckjord Station, as well as the case of *In re Louisiana-Pacific Corp.*, 10 ERC 1841 (1977). That document, the utilities contend, shows EPA's rejection of water quality as a factor in considering effluent reduction benefits pursuant to *Appalachian*. There, Cincinnati Gas' application for a variance from pH limitations was turned down because no fundamental difference was found to justify a less stringent standard. In commenting on receiving water quality, the Office of Enforcement of the EPA included in its recommendation to the Administrator the following:

The Administrator has determined *In the matters of Louisiana Pacific Corporation* NPDES No. CA0005894 and *Crown Simpson Pulp Company* NPDES No. CA0005882 10 ERC 1841 (September 16, 1977) ("Louisiana Pacific") that EPA is not authorized to grant a FDF variance providing relief from technology-based limitations guidelines due to the characteristics of the receiving water. The type of receiving water or the fact that the receiving water quality will not be harmed by the discharge or measurably improved by installing control equipment are not legally fundamental differences.

Recommendation on Variance Ruling FDF 78-01 at pp. 7-8.

We think the utilities' reliance on the recommendation in the Cincinnati Gas and Electric variance recommendation is misplaced. First and principally, the Administrator has not yet taken any action with respect to the variance. That being so, we

do not believe that, even assuming the utilities' construction of the recommendation to be correct, the recommendation of the Office of Enforcement to the Administrator is legally binding on the Agency. While it may have considerable significance, legal as well as practical, to the parties involved, it is little if anything more than an in-house memorandum from a subordinate in the Agency recommending to the Administrator the action he should take in passing on the requested variance. Second, the language we have above quoted, which is that upon which the utilities rely, we do not believe, read in context, can be taken to say that the Administrator in no instance will consider the quality of the receiving water as a part of the evidence in a case requesting a variance. Read literally, the language simply means that the quality of receiving water of itself is not a fundamental difference upon which a variance can be granted. This is entirely consistent with that part of our ruling in *Appalachian Power* in which we denied the claim of Consolidated Edison that it ought to be allowed to discharge into New York harbor not subject to effluent limitations because the harbor was already so dirty the addition of its effluent would make no difference. From an examination of the papers on hand in the Cincinnati Gas and Electric Company variance No. FDF 78-01, we believe, however, that the variance was not sought solely or even principally because of the water quality of the Ohio River into which the effluent flowed. Rather, it was based principally upon cost differentials and a claim that the addition of sulphuric acid to its settling ponds to reduce their alkalinity would do more harm to the receiving water than the effluent in question in that case.

Much the same remarks apply to EPA's decision in *In re Louisiana-Pacific Corp.*, 10 ERC 1841 (1977). In that case the claim of the industry was that a discharge of its effluent into the ocean would do no harm apparently because the ocean waters were so vast. The Administrator denied that variance, again entirely consistent with our opinion in *Appalachian Power*, concluding that he could provide no "...relief from

technology-based effluent limitations guidelines due solely to the characteristics of particular receiving waters. . . ." He stated that he could not permit exemption where the type of receiving water is the fundamental difference between the seekers of the variance and other pulp and paper mills. In his opinion, the Administrator time and again made it plain that the only thing he acted upon was a request for a variance based solely on water quality. At no place in that decision did the Administrator indicate that he did or would hold that the quality of the receiving waters was irrelevant in all instances in variance proceedings. It is true EPA does take that position in its brief in this court: "Receiving water quality simply cannot legally be considered a relevant factor in evaluating a variance request." Brief at p. 13. But as the mere recommendation of a subordinate does not bind the Agency,<sup>9</sup> neither does the mere assertion of an attorney in a brief except for the purposes of that case.

<sup>9</sup> The Deputy Assistant Administrator for Water Enforcement, who made the recommendation in *Cincinnati Gas and Electric Co.*, acts only as the principal adviser to the Administrator of EPA on matters of enforcement. 40 CFR § 1.31. Thus, his decision is not binding on the Administrator. In like vein, we held that a decision of the Provider Reimbursement Review Board, an in-house-board, does not bind the Secretary of HEW, who can modify or reverse that decision on his own motion. *Fairfax Hospital Ass'n, Inc. v. Califano*, 585 F.2d 602 (4th Cir. 1978). See also e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (NLRB rejected examiner's findings); *Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973) (Administrator decided contrary to the conclusion of the Hearing Examiner regarding the banning of DDT); *Adolph Coors Co. v. FTC*, 497 F.2d 1178 (10th Cir. 1974) (FTC overruled Administrative Law Judge's finding that Coors had not violated § 5 of the Federal Trade Commission Act); *Peterson v. Gardner*, 391 F.2d 208 (2d Cir. 1968), (Appeals Council can rule contra to decision to the Hearing Examiner); *Alcoa Steamship Co. v. Federal Maritime Commission*, 321 F.2d 756 (D.C. Cir. 1963) (Maritime Commission rejected recommendation of examiner and approved pooling agreement); *Braswell Motor Freight Lines v. USA*, 275 F.Supp. 98 (W.D. Texas 1967), aff'd 389 U.S. 569 (1968) (ICC rejected recommendation of its examiner).



Much as we disagree with the statement, there has been no application of it in the case before us, and no binding statement has been made to that effect by the Administrator. We will have to await a proper case to see if the Administrator in actual practice, or in the administration of the statute, takes the same extreme position his attorneys do in the brief in this case. No such extreme position can be read into the *Louisiana-Pacific* or *Cincinnati Gas* variance cases.

Because we believe the amendment of the variance provision will admit consideration of all of the factors required in our opinion, and there has been no concrete application denying a variance request which is under review, we decline to set aside EPA's amended regulations as a noncompliance with our mandate.<sup>10</sup>

EPA and NRDC also ask us to reconsider our holding in *Appalachian Power* to the effect that § 301(c) factors are applicable in consideration of variances from BPT limitations. *Id.* at 1359-60. This issue was dealt with again by this court in *National Crushed Stone Assoc. Inc. v. EPA*, 601 F.2d 111 (4th Cir. 1979), and in *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), cert. granted 48 L.W. 3513 (1980). In those cases the industries successfully sought application of *Appalachian Power's* BPT variance holding outside the steam electric industry to which EPA had limited our holding in *Appalachian*. We declined to change our *Appalachian Power* variance holding in those cases, and we decline to do so here.

We should note at this point that EPA continues to argue from extreme positions which we do not believe are justified by the statute, and even are not justified by the actions of the

<sup>10</sup> The utilities also rely upon EPA's comments published with its amendment of the variance provisions in 40 CFR Part 423. 43 FR 40324 (Sept. 22, 1978), typographically corrected at 43 FR 44847 (Sept. 29, 1978). The comments no more than reflect the ruling in *Louisiana-Pacific*, *supra*, and are not contrary to our mandate in *Appalachian Power*.

Administrator as distinguished from the language in his brief. EPA's principal argument in this case is shown by an example it gives that a discharger of a copper compound might be granted a variance if it were on a clean river but not if it were on a dirty river. The example misses the point. If the discharger were economically able [sic.] to correct its condition of violation *and* if its efforts resulted in reasonable further progress toward meeting the standard, then there is no reason to necessarily exclude the issuance of a variance. But if the continued discharge, during the time it took the industry to comply, might kill all aquatic life in the river, it might easily be said that the progress was not reasonable, while, if the discharge did little or no actual harm during this period, it might just as easily be said that reasonable progress was being made. To determine whether or not progress is reasonable, we repeat, it may be appropriate to consider water quality as *a factor*, that is to say as an item of evidence. Its sought-for arbitrary exclusion by EPA is simply too rigid a construction of the statute, and we do not believe it is justified. To hold otherwise ultimately can only result in regulation for regulation's sake, at which point, of course, a serious question of constitutional limitations would arise. We believe this useful statute deserves better treatment.

NRDC's petitions request us to hold that variances from BPT limitations cannot be granted to a discharger of toxic pollutants because of a 1977 amendment to the Act, which states:

The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) [33 USC § 1317(a)(1)]

§ 301(1) of the Act, 33 USC 1311(1).

It is the contention of NRDC that the amendments to the various regulations should have as required content a prohibition against issuing a variance from BPT limitations on account of toxic pollutants.



33 USC § 1317(a)(1) (§ 307(a)(1) of the Act) requires the Administrator to publish a list of toxic pollutants. Upon designation of a pollutant as toxic, § 307 (a)(2) [33 USC § 1317(a)(2)] goes into effect, requiring the EPA to set BAT standards for those pollutants.

As now interpreted by EPA, the variance clause applies to all pollutants for which BPT limitations are set by regulations. The BPT limitations for the steam electric industry include pollutants which are on the toxic pollutant list in 40 CFR Part 129. As noted, because of § 301(1), NRDC contends that EPA in a repromulgation of its variance regulations must in terms exclude toxics from their coverage. EPA and the utilities contend that § 301(1) was not intended to apply to BPT, but only to the specific sections of § 301 which allow an operator to be relieved of an effluent limitation. They also argue that a BPT variance is not a true variance so as to bring § 301(1) into effect. BPT variances, the argument goes, do not excuse anyone from meeting BPT limitation standards. Instead, they enable EPA to determine an individual BPT limitation for an industry procuring a variance. As a result, an operator granted a variance is still in compliance with its BPT limitation standard. Its standard is just different from others.

It is apparent that if either argument just above stated is correct that EPA is not required to exclude toxic pollutants from BPT variances. We think that § 301(1) does not apply to BPT variances.

Toxic pollutants prior to the 1977 amendments were not treated differently from other pollutants in that BAT technology was not necessarily applied, and dischargers discharging toxic pollutants were nevertheless included in those required to comply with BPT effluent limitations. While the 1977 amendments have required BAT limitations for discharges of toxic substances, they do not indicate that they are to operate retroactively so as to possibly retract any variance previously issued to an industry which just happened to be discharging

toxic substances, or to obliterate the known practice of EPA in not excluding toxic substances from those pollutants for which a variance might be granted under BPT effluent limitations. Neither does the legislative history justify such a construction. See 3 U.S. Code Congressional and Administrative News, 1977, p. 4326 et seq. The interpretation of the statute by EPA is entitled to some deference. *E. I. duPont de Nemours v. Train*, 430 U.S. 112, 135 n. 25 (1977). It is also true that retroactive application of a statute is not favored. *Union Pacific RR Co. v. Laramie Stockyards Co.*, 231 U.S. 190, 199 (1913). In our case, § 301(1) speaks to preventing the *modification* of any requirement of § 301 as it applies to any specific pollutant on the toxic pollutant list. On its face, it might thus be said to apply to such parts of the statute as § 301(c) which speaks of *modifying* requirements for BAT limitations. Indeed, in § 301(g), 33 USC § 1311(g), also a part of the 1977 amendments, it is provided that the Administrator, with the concurrence of the State, shall *modify* BAT requirements with exceptions including toxic pollutants. While this may well be an indication of Congressional intent that the statute should be read as EPA reads it, that § 301(1) applies only to those sections of § 301 which in terms permit *modification*, in all events the best that can be said for § 301(1) is that it is not clear. That being true, we give weight to the construction the administering agency has placed upon the statute, and, when we consider that retroactivity is not favored, we are of opinion that § 301(1) does not apply so as to require the exclusion of toxic substances from BPT variance provisions.

Our ruling today is limited to the holding that BPT variance regulations need not exempt toxic pollutants. We do not consider whether or not, or how, EPA will construe § 301(c) with relation to § 301(1). That question is not before us and its consideration would be premature.

Accordingly, being of opinion that EPA's amendments to 40 CFR §§ 423.12(a), 423.22(a), 423.32(a), and 423.42 are sufficient to permit a compliance by the agency with our opinion and mandate, the petition of the industry to require further consideration of this matter by EPA is denied. (This petition was filed in case No. 74-2096.) The petition of the industry dealing with the same subject in case No. 78-1701 is likewise denied for the same reasons.

The petitions of NRDC are also denied for the reasons stated in this opinion. (These petitions were filed in cases Nos. 78-1878 and 78-1902.)

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

No. 79-770

ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner*

v.

NATIONAL CRUSHED STONE ASSOCIATION, *et al.*,  
*Respondents*

DOUGLAS M. COSTLE, ADMINISTRATOR,  
ENVIRONMENTAL PROTECTION AGENCY,  
*Petitioner*

v.

CONSOLIDATION COAL COMPANY, *et al.*,  
*Respondents*

On Writ of Certiorari to the United States Court of Appeals  
for the Fourth Circuit

## BRIEF FOR RESPONDENTS

## OPINIONS BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit in *National Crushed Stone Association v. EPA* is reported at 601 F.2d 111. The opinion of that court in *Consolidation Coal Co. v. Costle* is reported at 604 F.2d 239. The opinions below are also set forth at pages 1a-37a and 40a-78a of the Government's Petition for a Writ of Certiorari.

We agree with the statement concerning this Court's jurisdiction set forth at page 2 of the Petitioners' Brief.

## STATUTES AND REGULATIONS INVOLVED

Pertinent portions of the Act and Title 40 of the Code of Federal Regulations are set forth in Appendix A to the Government's Brief, at pages 1a-6a.

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether the variance provision contained in regulations prescribing "presumptively applicable" industry-wide effluent limitations promulgated pursuant to the Clean Water Act<sup>1</sup> by the United States Environmental Protection Agency (EPA) and based upon application of the "best practicable technology currently available" (BPT), 33 U.S.C. §§ 1311(b)(1)(A), 1314(b)(1) (1976), must allow some consideration of the variance applicant's economic capability to comply with those limitations when such variance provisions redefine BPT for a "fundamentally different" facility by reference to statutory factors including "total cost of application of technology" in relation to effluent reduction benefits?

(2) Whether the court below was correct in concluding that EPA's BPT variance provision must allow some consideration of economic capability versus effluent reduction benefits by analogy to section 301(c) of the Act?

## COUNTERSTATEMENT OF THE CASE

1. The issue raised by the Government in these cases concerns the proper scope of EPA's regulations authorizing variances from industry-wide BPT effluent limitation

<sup>1</sup> The Federal Water Pollution Control Act Amendments (FWPCA), Pub. L. No. 92-500, 86 Stat. 816, were amended by the Clean Water Act Amendments of 1977 (CWA), Pub. L. No. 95-217, 91 Stat. 1566, and by the Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467. Hereinafter, this statute as currently amended will be referred to as the "Act" or the "Clean Water Act."

regulations. This issue results in large part from the confused and conflicting language in the Clean Water Act in which Congress attempted to implement a far reaching program for the control of water pollution. Technology based limitations on the amounts of pollutants which are discharged in effluents are a crucial element of this program.

The Act requires "*classes and categories* of [existing] point sources" to achieve such effluent limitations based on the "best available technology economically achievable" (BAT) by 1984, or in some cases, 1987, while existing "*point sources*" are required to achieve BPT limitations by 1977, or in some cases, 1979.<sup>2</sup> 33 U.S.C. §§ 1311(b)(1)(A), 1311(b)(2)(A), (C), (D), (F), 1319(a)(5)(B) (1976 & Supp. I, 1977). BPT and BAT are to be determined by reference to certain statutory factors specified respectively in sections 304(b)(1), 304(b)(2) of the Act, which also require EPA to develop BPT and BAT effluent limitations "guidelines" based on these factors for "classes and categories of point sources". 33 U.S.C. §§ 1314(b)(1), 1314(b)(2) (1976 & Supp. I, 1977).

However, Congress failed to explain the relationship between these EPA-promulgated section 304 guidelines and the section 301 effluent limitations. Congress also failed to explain whether EPA or the states were to establish section 301 effluent limitations, and how those

<sup>2</sup> The Act defines "point source" as:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14) (1976).

limitations are to be applied through permits issued under the National Pollutant Discharge Elimination System (NPDES) established by section 402 of the Act, 33 U.S.C. § 1342 (1976). Finally, Congress did not explain why section 301 BPT limitations were to be established for "point sources", while BAT limitations were to be established for "classes and categories of point sources". See *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 116-21 (1976).

Early in EPA's implementation of the Act, these ambiguities in congressional intent coalesced to form one crucial question: whether specific, numerical BPT and BAT effluent limitations were to be developed and applied by EPA through promulgation of nationally uniform, industry-wide regulations, or whether EPA was instead only to provide general guidance through section 304(b) guidelines to NPDES permit issuers who would then set specific effluent limitations in individual permits on the basis of these guidelines. Given Congress' failure to answer this question, its resolution was left to the courts.

2. In *duPont v. Train*, 541 F.2d 1018 (1976), the United States Court of Appeals for the Fourth Circuit interpreted the Act as allowing EPA to promulgate regulations establishing specific BPT and BAT effluent limitations regulations which are "presumptively applicable" to classes and categories of existing point sources. However, that court also held that this presumption may be rebutted by a particular facility in an application for a variance from these nationally uniform, industry-wide regulations. *Id.* at 1028. The Fourth Circuit in *duPont v. Train* rested its conclusion that industry-wide BPT effluent limitation regulations must contain variances in part on the fact that the Act explicitly provided in section 301(c), 33 U.S.C. § 1311(c) (1976), for case-by-case flexibility in applying 'class and category' BAT limitations to specific point sources. Section 301(c) authorizes

EPA to modify the industry-wide BAT limitations when a discharger demonstrates to EPA that it is employing the "maximum use of technology within [its] economic capability" and that the modified BAT limitations "will result in reasonable further progress toward the elimination of the discharge of pollutants". 541 F.2d at 1028 (citing 33 U.S.C. § 1311(c) (1976)). However, while the Fourth Circuit determined that a variance provision was a necessary component of a regulatory scheme which rested on nationally uniform BPT effluent limitation regulations, it declined to discuss the appropriate scope of such a variance provision because, at the time, EPA's administration of its variance provision regulations was a "matter of speculation." 541 F.2d at 1028.

On review of the Fourth Circuit's *duPont v. Train* decision, this Court held that the second-stage BAT limitations were clearly to be promulgated by EPA as nationally uniform, industry-wide regulations. *duPont*, 430 U.S. at 126-27, 136. The Court then held, for various reasons, that it would be incongruous for the 1977 BPT limitations to be established by a process different from that used to establish BAT limitations. 430 U.S. at 127-28. Thus, by analogy to EPA's more obvious statutory authority to promulgate industry-wide BAT limitations, this Court in *duPont* agreed with the Fourth Circuit<sup>3</sup> that "the statute authorizes the 1977 BPT limitations as well as the BAT limitations to be set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations." 430 U.S. at 128 (emphasis added). In reaching these conclusions, this Court noted and discussed section 301(c), the Act's

<sup>3</sup> Except for reversing the Fourth Circuit's holding that variances are required for new as well as existing sources, this Court in *duPont* affirmed "all other aspects" of the Fourth Circuit's decision. 430 U.S. at 139.

express provision for modifying industry-wide BAT limitations on economic capability grounds. 430 U.S. at 127 n.17. And in a footnote, this Court agreed with the Fourth Circuit that "consideration of whether EPA's [BPT] variance provision has the proper scope would be premature." 430 U.S. at 128 n.19.<sup>4</sup>

3. Subsequent to its *duPont v. Train* decision, the Fourth Circuit addressed the scope of BPT variance provisions in three decisions, including the two now before this Court for review.<sup>5</sup> Each of these decisions involved essentially the same variance provision, but EPA's interpretation of that provision changed considerably from the first to the last two.

<sup>4</sup> In its opinion in *duPont*, this Court also clarified the ambiguous relationship between section 304(b) effluent limitation guidelines and section 301 effluent limitations by allowing EPA to combine promulgation of section 304(b) guidelines, which "survey the practicable or available pollution-control technology for an industry and assess its effectiveness," with the Agency's promulgation of section 301 effluent limitations, which "determine the effluent limitations for particular plants." See 430 U.S. at 130-32.

<sup>5</sup> Prior to this Court's *duPont* decision, three Circuits in addition to the Fourth upheld EPA's authority to promulgate single-number, industry-wide, BPT effluent limitation regulations which included variance provisions. See *American Paper Inst. v. EPA*, 543 F.2d 328, 335-38 (D.C. Cir. 1976), cert. dismissed, 429 U.S. 967 (1976); *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1030-33 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977); *Natural Resources Defense Council v. EPA*, 537 F.2d 642 (2d Cir. 1976). The Third Circuit rejected both this industry-wide, single-number approach and EPA's variance provision as being too inflexible. See *American Iron & Steel, Inst. v. EPA*, 526 F.2d 1027, 1046-47 (3rd Cir. 1975). However, none of these courts reached any holding as to the proper scope of a BPT variance provision.

The first of these decisions was *Appalachian Power Co. v. Train*, 545 F.2d 1351 (1976), in which the Fourth Circuit set aside as "unduly restrictive" a BPT variance provision for the steam electric power generating point source category which contained essentially the same language as the variance provision later remanded by that court in the *Crushed Stone* and *Consolidation Coal* decisions. Compare *Appalachian Power* at 1358-60 with *Crushed Stone*, 601 F.2d at 122 and *Consolidation Coal*, 604 F.2d at 243-44. Prior to the *Appalachian Power* decision, EPA had interpreted its BPT variance provision as being limited only "to considerations of technical and engineering factors," and as precluding any consideration of other factors specified by section 304(b)(1)(B) of the Act such as non-water quality environmental impact and "total cost" in relation to effluent reduction benefits. See *Appalachian Power*, 545 F.2d at 1359-60. The Fourth Circuit rejected this interpretation and held, *inter alia*, that both section 304(b)(1)(B) and section 301(c) of the Act demonstrated that cost considerations were relevant to BPT variance requests. 545 F.2d at 1359-60.

Subsequent to the *Appalachian Power* decision, EPA engaged in a rather convoluted series of actions through which it ultimately arrived at its current interpretation in these cases of its standard BPT variance provision. First, in rejecting an application for a BPT variance filed by a member of the pulp-paper industry, EPA stated that BPT variances must be based "on fundamental differences in factors which are appropriate to technology-based regulations and limitations derived through the variance process must still meet the congressional definition of best practicable technology currently available." *In re Louisiana-Pacific Corp.*, 10 ERC 1841, 1851 (Sept. 15, 1977). Second, in response to the Fourth Circuit's remand in *Appalachian Power*, EPA promulgated a new BPT variance provision applicable only to



steam electric power plants which "would allow the [NPDES] permit issuers to consider significant cost differentials and other economic factors applicable to the particular source involved." 43 Fed. Reg. 8813 (March 3, 1978). Third, on October 17, 1978, EPA finally withdrew its original interpretation of its standard BPT variance provision which limited the scope of that provision to consideration of only technical and engineering factors. It was this interpretation which the Fourth Circuit had struck down in *Appalachian Power* as being "unduly restrictive." See *Crushed Stone*, 601 F.2d at 123. Finally, on June 7, 1979, EPA promulgated regulations governing its NPDES permit program that contained a BPT variance provision which explicitly includes consideration of all of the factors contained in section 304(b)(1)(B) of the Act, including the "cost of compliance with required control technology." 40 C.F.R. § 125.31(d)(6), 44 Fed. Reg. 32950. However, the Agency interprets this consideration of "cost" to preclude any examination of the "discharger's ability to pay for the required waste treatment." 40 C.F.R. § 125.31(e)(3), 44 Fed. Reg. at 32951. See generally 44 Fed. Reg. 32893-94 (explanatory preamble).

4. The Fourth Circuit in *Crushed Stone* and *Consolidation Coal* did not hold that BPT variances must be granted to any facility which cannot afford to comply with industry-wide BPT effluent limitation regulations. Indeed, the court below specifically rejected EPA's assertion that *Appalachian Power* required the Agency to grant variance requests based only on a plant's economic inability "to comply with the national BPT limitation." 601 F.2d at 123. On the contrary, the Fourth Circuit in *Crushed Stone* only held that if a facility "is doing all that the maximum use of technology within its economic capability will permit and if such use will result in reasonable further progress toward the elimination of the

discharge of pollutants," it should be given a BPT variance "should it comply with any other requirements of the variance." 601 F.2d at 124 (quoting *Appalachian Power*, 545 F.2d at 1378) (emphasis in the original).<sup>6</sup>

In *Consolidation Coal*, the Fourth Circuit, citing its *Crushed Stone* decision, remanded EPA's BPT variance provision for the coal mining point source category. 604 F.2d at 243-244. In directing EPA to revise that provision in conformity with *Crushed Stone* and *Appalachian Power*, the court in *Consolidation Coal* noted the industry petitioners' argument that BPT variances must allow consideration of all section 304(b)(1)(B) and 301(c) factors. 604 F.2d at 243-44.

5. The Government attempts to convince this Court that the position urged by respondents would create a "loophole" designed to exempt from control marginal plants that cannot survive with the additional costs imposed by BPT limitations. See Petitioners' Brief at 23, 27, 30-35. Because the Government places such stress on

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<sup>6</sup> The Fourth Circuit in *Crushed Stone* relied on its previous holding in *Appalachian Power* that EPA must consider not only "the statutory factors set out in" section 301(c) when ruling on a variance request, but also those factors set out in section 304(b)(1)(B) of the CWA. *Appalachian Power*, 545 F.2d at 1359-60. The *Appalachian Power* court also explained that "[i]n requiring that EPA give weight to the relevant statutory factors in developing a subsequent variance provision, we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage." 545 F.2d at 1360 n.23. Instead,

an overall cost-benefit analysis for each category or subcategory satisfies the mandate of § 304 in this regard. The variance provision should, however, allow the permit issuer to consider significant cost differentials of the particular point source involved.

545 F.2d at 1360 n. 23.



this issue, we wish at the outset to state clearly our position. We do not contend that a plant should be entitled to a BPT variance simply because it is financially troubled. Higher "total costs" than those assumed by EPA in establishing its BPT regulations for a particular industry do not occur in a vacuum. Rather, they are normally the result of tangible factors—the age of equipment and facilities involved, the process employed, engineering and process factors, energy and other requirements. At the same time, the fact that a particular discharger is not economically capable of installing the required control technology which EPA has determined the industry in general is capable of installing may well place that discharger in a position that is "fundamentally different" from others in the industry. The inquiry, however, does not stop here. Rather, in redefining BPT for a facility that is "fundamentally different", the permit issuer must consider all of the statutory factors, including the "total cost" of various treatment alternatives considered. If an alternative is so expensive that it would bankrupt the plant, then the economic consequences of forcing the plant to close is part of the "total cost" in relation to effluent reduction benefits that should be considered along with the other statutory factors in determining BPT for the plant.

#### SUMMARY OF ARGUMENT

BPT variances were not specifically addressed by Congress in the 1972 amendments to the FWPCA. Instead, they were required by this and other Courts to preserve EPA's authority to promulgate presumptively applicable nationally uniform, industry-wide BPT limitation regulations. EPA's industry-wide BPT limitations do not adequately take into account facilities whose characteristics are "fundamentally different" from the assumptions on which EPA bases those industry-wide BPT limitations. Thus, an adequate BPT variance is an essential

part of the Agency's effluent limitations regulatory program.

Given EPA's interpretation of its BPT variance provision as including all of the factors contained in section 304(b)(1)(B), consideration of the economic capability of the discharger to meet the presumptively applicable BPT effluent limitations regulations must be relevant to BPT determinations. EPA interprets its BPT variance provision as allowing limitations based on BPT to be defined for anomalous facilities at the NPDES permit issuing stage, and therefore admits that all factors relevant to its determination of industry-wide BPT limitations are relevant to BPT variance determinations. These factors, set out in section 304(b)(1)(B) of the Act, include the "total cost of application of technology" in relation to effluent reduction benefits. Congress clearly defined "total cost" to include some consideration of economic impact or capability. Since economic capability is a relevant consideration when EPA is developing industry-wide BPT limitations, it must also be relevant to BPT variance determinations because these determinations are, according to EPA, based on the same section 304(b)(1)(B) factors.

Since EPA's authority to promulgate industry-wide BPT limitations is derived by analogy to its authority to develop industry-wide BAT limitations, economic capability is also a relevant consideration in BPT variance determinations by analogy to section 301(c) of the Act. Section 301(c) of the Act allows industry-wide BAT limitations to be modified for a facility upon a demonstration that it is doing all within its economic capability and is achieving a reasonable further progress in reducing pollutant discharge. This required demonstration is analogous to and consistent with the balancing of "total cost" (including economic impact or capability) and effluent reduction benefits in BPT variance determinations.

EPA's insistence that the express language of section 301(c) renders it inapplicable to BPT variances misses the point. The court below never literally applied section 301(c) to the BPT variance provision. Instead, it only referred to section 301(c) to determine what economic "tests" or "considerations" were appropriate in applying the "total cost" factor in section 304(b) (1) (B) in the context of a BPT variance determination. This reference to section 301(c) for guidance is analogous to this Court's reasoning in *duPont* that Congress' express provision for uniform BAT regulations sustained an implication of EPA's authority to promulgate industry-wide BPT limitations. Any other interpretation would result in BAT limitations being more flexible than BPT limitations, even when those limitations are identical. The court below did not hold that a BPT variance must be granted to any facility which cannot afford the industry-wide BPT limitations. Instead, it held only that the balance between cost, including economic capability, and pollutant reduction benefits is always one factor appropriate to BPT variance determinations.

The legislative history of the 1977 Amendments to the Act supports the reasoning of the court below. Congress was aware of judicially sanctioned BPT variances at the time it was considering the 1977 amendments. Yet it did not eliminate them. Congress was also aware of the Fourth Circuit's *Appalachian Power* decision, which required consideration of economic capability in BPT variance determinations. Yet Congress never criticized or overruled that decision despite its express rejection of other decisions. On the contrary, there is evidence that Congress agreed with the Fourth Circuit BPT variance provision holding in *Appalachian Power*. Moreover, one of the primary goals of the 1977 Amendments to the Act was to render the effluent limitations regulatory scheme more flexible, and this flexibility is one of the functions served by the BPT variance required by the court below.

The decisions below do not require EPA to determine economic impact on a plant-by-plant basis. EPA need only examine a discharger's demonstration of total cost, including economic impact, versus effluent reduction benefits at its facility. There is no evidence that this comparison would burden EPA any more than determining fundamental differences at the applicant's facility in other pertinent factors set forth in section 304(b) (1) (B).

EPA's interpretation of the appropriate scope of the BPT variance provision is not entitled to deference by the Court. EPA's interpretation has been inconsistent, is not longstanding, and conflicts with actual Agency practice. Moreover, EPA's interpretation also conflicts with statutory language and the relevant legislative history, and it has never been sanctioned by Congress. Finally, EPA's interpretation of its BPT variance provision is internally inconsistent and unreasonable.

## ARGUMENT

### I. A VARIANCE PROVISION THAT INCLUDES CONSIDERATION OF ECONOMIC CAPABILITY IS REQUIRED BY THE LANGUAGE AND STRUCTURE OF THE ACT

#### A. The Function of the BPT Variance Provision

BPT variance provisions were not specifically addressed by Congress when it drafted the 1972 Amendments to the Act. Instead, they were recognized by this and other courts both as a necessary concomitant of EPA's authority to promulgate nationally uniform, industry-wide BPT effluent limitations,<sup>7</sup> and as a mechanism required

<sup>7</sup> See, e.g., *duPont*, 430 U.S. at 127-28; *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031-34 (D.C. Cir. 1978). Others besides the courts have recognized the critical role that a

to ensure that the variety among facilities within an industry is adequately addressed at some point because that variety is often not addressed by EPA's industry-wide limitations. See *NRDC v. EPA*, 537 F.2d at 647.<sup>8</sup>

Indeed, it would be unrealistic to expect EPA's industry-wide BPT effluent limitations regulations to reflect fundamental differences among plants given the manner in which they are developed. For example, EPA did not add the costs of all individual coal mines, crushed stone, or construction sand and gravel facilities in arriving at

meaningful variance provision plays in the BPT regulatory scheme. For example, in testimony before the Subcommittee on Environmental Pollution in 1977, the Natural Resources Defense Council (NRDC) testified that "a fundamental variance provision" was integral to the Act's system of "national, uniform, minimum effluent limitations." See Federal Water Pollution Control Act Amendments of 1977, Hearings before the Subcommittee on Environmental Pollution of the Senate Comm. on Environment and Public Works, 95th Cong., 1st Sess., Series 9-H25, Part 9, at 37 (1977). Despite this Court's holding in *duPont* that such variances are a prerequisite to EPA's promulgation of industry-wide BPT limitations for a particular category of dischargers, the Government nevertheless questions in its Brief "whether EPA need grant any variances from the 1977 limitations at all." Petitioners' Brief, at 25.

<sup>8</sup> As EPA itself pointed out in its BPT variance provisions for the coal mining and crushed stone industries, its industry-wide BPT limitations may not address the fundamental differences among plants within these industries. In relevant part, these variance provisions state that:

In establishing the limitation set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors . . . which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been avail-

its "total cost" estimate for these industries. Instead, the Agency utilized certain fictional "model plants" employing all the required treatment technologies to develop its industry-wide cost estimates.<sup>9</sup> Thus, an adequate BPT variance provision is crucial if fundamental differences among real plants, including fundamental differences in their "total cost," are to be adequately addressed at some stage in the limitation setting process.<sup>10</sup> Such a provision does not constitute a "loophole" through which individual facilities may escape BPT compliance. On the contrary, it redefines BPT for those "fundamentally different" individual facilities whose operations are not accurately reflected by the assumptions underlying EPA's industry-wide BPT limitations.

Hypothetically, other devices could accomplish the same purpose. EPA could elaborately subcategorize every industry so that only genuinely similar facilities are subject to the same BPT limitations.<sup>11</sup> However, totally accurate

able and, as a result, these limitations should be adjusted for certain plants in this industry.

40 C.F.R. §§ 434.22, .32, .42 (1979) (coal mining category); 40 C.F.R. §§ 436.33, .43 (1979) (mineral mining and processing category).

<sup>9</sup> See, e.g., EPA Development Document for Coal Industry at 183, 186, Appendix A at A-3, A-4; EPA's Economic Impact Report for the Mineral Mining and Processing Industry at I-4 to I-6, Appendix B at B-1 to B-3.

<sup>10</sup> The Agency has expressly acknowledged the limitations on its economic models:

"To a certain extent, each plant in the industry is a special case. The use of a model facility cannot take such specificity into account."

See Appendix B at B-3.

<sup>11</sup> For example, the D.C. Circuit in *Weyerhaeuser* pointed out that in developing effluent limitations for the "bleached"

subcategorization of a very large, diverse industry would undoubtedly strain EPA's resources far more than processing an occasional variance request at the NPDES permit stage. For example, surface and underground coal mines and coal preparation plants are in operation in virtually every major region of the country and are, therefore, subject to a variety of climatic, hydrological and geologic conditions. These varying background conditions determine not only volume and constituents of waste water discharges, but also the type and degree and therefore the cost of treatment required.<sup>12</sup> Similarly, there are more than 4,800 crushed stone facilities which range in size from less than 25,000 tons/year to 15 million tons/year annual production. The volume of contamination by pollutants at a particular quarry is dependent on site specific precipitation patterns, geological features, mine layout and topography. The construction sand and gravel industry is equally diverse, since it encompasses more than 5000 facilities located throughout the country, ranging in size from under 25,000 tons per year to over 1 million tons per year annual production. The amount of process water used by these facilities, and its contamination, depends on the type of raw material, the amount of impurities and fines present, and

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paper industry, EPA identified 16 different categories, divided into 66 subdivisions, resulting in one set of limitations for every 5 mills. As the *Weyerhaeuser* Court noted, "This extensive subdivision safeguarded against overzealous standards, increased the confidence that can be placed in the practicability of the regulations, and diminished the need to handle variation through the variance process. 590 F.2d at 1053 (emphasis added); cf. *duPont*, 430 U.S. at 131 n.21. (Court stresses use of subcategorization to support diversity.)

<sup>12</sup> See Appendix A at A-2 to A-3.

the customer's specifications, all of which vary from plant to plant.<sup>13</sup>

Totally accurate subcategorization of such large and diverse industries would be extremely difficult. Therefore, for these and other similarly situated industries, a BPT variance provision that allows for consideration of fundamental differences between an individual discharger and the hypothetical or "average" discharger on which the BPT limitations regulations were based is crucial if only genuinely similar plants are to be subject to similar effluent limitations.

Analysis of the Act and its legislative history demonstrate that such provisions must provide for consideration of all of the statutory factors relevant to determining BPT. One of these factors is the "total cost" to the facility of meeting the nationally uniform regulations, including the economic capability of the facility to install necessary control equipment.

**B. The BPT Variance Provision Must at Least Allow Consideration of All Factors Contained in Section 304(b)(1)(B), and These Factors Include Economic Capability**

Since the function of a BPT variance is to determine BPT at an individual facility, all factors relevant in setting industry-wide BPT limitations must also be relevant under the BPT variance. *Weyerhaeuser*, 590 F.2d at 1034-36; *Appalachian Power*, 545 F.2d at 1359-60; see

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<sup>13</sup> See, e.g., EPA Development Document for the Mineral Mining and Processing Industry, Appendix C at C-5, C-6. EPA did not even attempt to survey all of the plants in the mineral mining industry or mines in the coal mining industry that would be subject to the industry-wide BPT effluent limitations regulations. There are over 4800 crushed stone plants, according to EPA, but the Agency visited only 41 and had data for only 189, less than 5 percent of the industry. See Appendix C at C-2 to C-4.



*United States Steel Corp. v. Train*, 556 F.2d 822, 844-47 (7th Cir. 1977). EPA itself has agreed with this inevitable conclusion. Compare Petitioners' Brief, at 19-20 with 43 Fed. Reg. 50042 (Oct. 26, 1978). Given universal agreement that BPT variance provisions at least include consideration of all statutory industry-wide BPT factors, one must ascertain congressional intent as to the precise nature of these statutory BPT factors in order to make a determination of the variance provision's proper scope.

These factors clearly include "total cost" since section 304(b)(1)(B) requires EPA to consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." 33 U.S.C. § 1314(b)(1)(B) (1976).<sup>14</sup> The legislative

<sup>14</sup> During the House debate on the 1972 FWPCA Conference Committee Report, Representative Wright emphasized congressional intent that best "practicable" technology was to be defined by reference to all the section 304(b) factors, including "total cost":

*The conference report utilizes the term "practicable" in section 301(b)(1)(A) in the requirements for effluent limitations which must be achieved by July 1, 1977. There are set out in section 304(b)(1)(B), which relates to section 301(b)(1)(A), a number of factors relating to the assessment of "best practicable control technology currently available." This includes consideration of the total cost of application of technology in relation to the effluent reduction to be achieved from such application, nonwater quality environmental impact, and energy requirements.*

A Legislative History of the Water Pollution Control Act Amendments of 1972, Congressional Research Service, Library of Congress, Ser. No. 93-1 (Jan. 1973) (hereinafter referred to as 1972 Leg. Hist.), Vol. 1, at 259-60 (emphasis added).

history of the 1972 Amendments to the Act defined the phrase "total cost" contained in section 304(b)(1)(B) as those

*internal, or plant, costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation and rural area economic development sustained by the community area, or region*<sup>15</sup>

Despite this unambiguous definition of "total cost," the Agency at least in these cases still argues that its required cost considerations during BPT variance proceedings need encompass no consideration of the variance applicant's ability to afford those industry-wide BPT limitations. See, e.g., Petitioners' Brief, at 2, 11, 17, 19, 22-24.<sup>16</sup>

Contrary to the Government's arguments, however, Congress unambiguously defined "total cost" not only to include the individual owner or operator's "internal, or plant costs," but also "external costs" such as "unemployment" and "dislocation".<sup>17</sup> Only by surveying the economic

<sup>15</sup> [1] 1972 Leg. Hist. at 231 (Rep. Jones explaining FWPCA Conference Rep. on House floor).

<sup>16</sup> According to EPA, BPT variances will now be granted upon a showing that

*the plant's own compliance costs with the national guideline limitation would be X times greater than the compliance costs of the plants EPA considered in setting the [1977 limitations].*

Petitioners' Brief at 11 (quoting 43 Fed. Reg. 50042 (Oct. 26, 1978)). In contexts other than the cases now before this Court for review, however, EPA has apparently agreed that BPT variance provisions must encompass economic capability considerations. Text, *infra* at 39-41.

<sup>17</sup> One must note the importance of Representative Jones' statement as to congressional intent underlying the term "total cost". Not only was he Floor Manager during the House



capability of the plants which make up the industry in question, can EPA consider costs in terms of unemployment and social dislocation in determining what constitutes best "practicable" technology. During oversight hearings on the 1972 Amendments to the FWPCA, Representative Wright reemphasized congressional intent that the statutory term "practicable" encompassed economic capability considerations:

[T]he word "practicable" encompasses technology, it encompasses economics, it encompasses local circumstances, *it encompasses the capability of a given plant or industry to perform to a given level without incurring such severe financial loss that it would have to curtail its operations and result in unemployment.*<sup>18</sup>

Thus, the economic capability of affected facilities to install required pollution control technology is clearly relevant in setting industry-wide BPT limitations under section 304(b)(1)(B) of the Act. Consequently, it must also be a relevant consideration under EPA's BPT variance provision since, as EPA has stated, that provision must include consideration of all industry-wide BPT

debate on the 1972 Amendments, but he also is frequently cited in the Government's Brief as an authority on Congress' intent as to the Act. See Petitioners' Brief, at 31, 34.

In 1977, Congress also stressed the importance of "total costs" in determining BPT limitations for depressed industries. A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act, Congressional Research Service, Library of Congress, Ser. No. 95-14 (Oct. 1978) (1977 Leg. Hist.), Vol. 4, at 1314.

<sup>18</sup> Hearings on the Implementation of the Federal Water Pollution Control Act Before the Subcom. on Investigations and Review of the House Comm. on Pub. Works, 93d Cong., 2d Sess. 490 (1974) (emphasis added).

factors. *Appalachian Power*, 545 F.2d at 1359; see *United States Steel*, 556 F.2d at 845-46 & n.42; cf. *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 301 (3rd Cir. 1977) (court approves EPA procedure for comparing general BPT cost estimates with "total (including site-specific) costs of reporting plants").

The D.C. Circuit's opinion in *Weyerhaeuser*, upon which both the Government and NRDC rely, must be read as reaching this same conclusion if that opinion is to be internally coherent. In *Weyerhaeuser*, the court concluded that

[a]lthough the "total cost" of pollution control at the petitioning mill must be considered under a satisfactory variance provision, it is only relevant "in relation to the effluent reduction benefits to be achieved" at that mill, section 304(b)(1)(B); so long as those costs relative to the pollution reduction gains are not different from those that may be imposed on the industry as a whole, the difficulty, or in fact the inability, of the operator to absorb the costs need not control the variance decision.

590 F.2d at 1036 (footnote omitted) (emphasis in the original).<sup>19</sup>

<sup>19</sup> In construing Congress' definition of "total cost," the D.C. Circuit in *Weyerhaeuser* concluded that "[u]nder this definition certain economic factors must be considered but they need not be decisive if associated with commensurate pollution-ending gains, and they do not, without more, include the fact that the operator is experiencing difficulty in, or is unable to absorb the costs." 590 F.2d at 1036 n.35 (emphasis added). This statement is only consistent with other aspects of the *Weyerhaeuser* opinion if one interprets it as requiring a fundamental difference between the variance applicant's cost/effluent reduction benefit ratio and that which was established by EPA for the entire industry. Under *Weyerhaeuser*, this fundamentally different cost/benefit ratio would be necessary

Implicit in this passage from the *Weyerhaeuser* opinion is the conclusion that when the variance applicant's ratio of "total cost" (including economic capability) to effluent reduction benefits is "different" from that which could have been imposed by the relevant industry-wide BPT limitations, then the applicant's "difficulty" or "inability" to afford those limitations may "control the variance decision." Thus, although the Government cites the *Weyerhaeuser* opinion at numerous points in its Brief, e.g., Petitioners' Brief, at 24 n.19, 25, 29, the D.C. Circuit's analysis does not support the Government's position that it need not, and, in fact, cannot ever consider economic capability in determining BPT variance requests.

On the contrary, *Weyerhaeuser* is generally consistent with the Fourth Circuit's opinions on most aspects of this total cost issue.<sup>20</sup> Both courts agree that EPA must consider an individual operator's "total cost." Both courts also agree that BPT variances should not be granted simply because an individual operator cannot afford to install industry-wide BPT limitations. Instead, an individual operator's economic ability to comply with industry-wide BPT limitations is only one component of a "total cost" calculation which in turn must be balanced against effluent reduction benefits. Compare 590 F.2d at 1036 with *Crushed Stone*, 601 F.2d at 123-24. And both courts also acknowledge the relevance of BPT variance provision factors other than this total cost/effluent re-

to trigger some consideration of economic capability. Compare 590 F.2d at 1035-36 with 590 F.2d at 1039 nn.38-39, 1040.

<sup>20</sup> Indeed, at numerous points in its *Weyerhaeuser* opinion, the D.C. Circuit cited the Fourth Circuit's *Appalachian Power* opinion with approval. See 590 F.2d at 1036 n.35, 1038, 1039 n.38.

duction benefit comparison. Compare 590 F.2d at 1035 n.34, 1040 with 601 F.2d at 124 and 545 F.2d at 1359-60.

**C. The Factors Set Forth In Section 301(c) of The Act are By Analogy Relevant to BPT Variance Determinations**

This Court in *duPont* upheld EPA's authority to promulgate industry-wide BPT limitations only by analogy to its more obvious statutory authority to promulgate industry-wide BAT limitations, which are subject to modifications on grounds including economic capability balanced against effluent reduction benefits.<sup>21</sup> The Fourth Circuit in its earlier opinion in *duPont v. Train* had reached this same conclusion by a similar analysis. Crucial to the Fourth Circuit's *duPont v. Train* holding on this point were: (i) EPA's authority under Section 301(c) to modify BAT limitations; and (ii) that court's conclusion that "the 'best practicable control technology' for 1977 may not be construed more stringently than the 'best available technology economically achievable' as ameliorated by the qualification of § 301(c) for [BAT] limitations." 541 F.2d at 1028.

First in *Appalachian Power* and subsequently in *Crushed Stone* and *Consolidation Coal*, the Fourth Circuit used this analogy to the BAT limitations in holding that any BPT variance provision must take into consideration, *inter alia*, the statutory factors set out in section 301(c). 601 F.2d at 123-24; 545 F.2d at 1359-60. The Fourth Circuit reasoned that Congress did not intend 1977 BPT limitations to be applied any more inflexibly than the second-stage BAT standards. Since the harsh inflexibility of the BAT requirements is mitigated by the economic capability consideration specified by section 301(c), economic capability should also be

<sup>21</sup> Text, *supra* at 5-6.

relevant to the BPT variance.<sup>22</sup> This same conclusion was reached by a commentator cited twice in the Government's Brief.<sup>23</sup>

The Fourth Circuit in *Appalachian Power, Crushed Stone*, and *Consolidation Coal* held neither that the BPT variance provision must be identical to section 301(c), nor that section 301(c) applied "*ex proprio vigore*" to BPT limitations. Petitioners' Brief, at 26. Rather, it only held that section 301(c) factors should also be relevant under the BPT variance. In essence, the Fourth Circuit referred to section 301(c) to determine what economic considerations were appropriate when the permit issuer examined, in the context of a BPT variance request, the "total cost" factor contained in section 304(b)(1)(B). Nevertheless, the Government continually recites the actual text of sections 301(c) and 304(b)(2)(A)—particularly the phrases "*economically achievable*" and "reasonable further progress toward the elimination of the discharge of pollutants"—and argues that, by their terms, these sections render the section 301(c) factors inapplicable to BPT variances. See Petitioners' Brief, at 23-25, 27. The Government's concern with the Act's statutory language, which it had earlier described as "less than pellucid" (*id.* at 18), is curious since section

<sup>22</sup> NRDC argues in its *amicus* brief that "Congress made the explicit economic escape value in section 301(c) applicable only to the more costly BAT limitations." NRDC Amicus Brief, at 20. BAT limitations will not be "more costly" than BPT limitations when, as in the case of the crushed stone industry, EPA promulgates identical BPT and BAT limitations.

<sup>23</sup> See Kalur, *Will Judicial Error Allow Industrial Point Sources to Avoid BPT and Perhaps BAT Later? A Story of Good Intentions, Bad Dictum and Ugly Consequence*, 7 Ecol. L.Q. 955, 976 (1979) (cited in Petitioners' Brief at 26, 33 n.25).

301(b)(1)(A) requires effluent limitations for "point sources", not "classes and categories" of point sources. Thus, industry-wide BPT limitation regulations are only justified "as a matter of statutory language" if one analogizes to the Act's required procedures for developing 1984 BAT limitation regulations, as this Court did in *duPont*. The Act expressly allows modification of these BAT limitations through section 301(c) on grounds including a facility's inability to afford them. Consequently, by analogy, a BPT variance provision should also encompass similar considerations of economic capability. This conclusion underscores the fact that the phrase "total cost" used in section 304(b)(1)(B), applied in the context of a request for a variance from "presumptively applicable" BPT effluent limitations regulations, must include consideration of the "economic capability" of the requestor to comply with the otherwise applicable BPT effluent limitations regulations.

Finally, the Government contends that it is not required to perform any kind of cost-benefit balancing when developing BAT limitations, while only some form of industry-wide cost-benefit balancing is required for 1977 BPT limitations. According to the Government, this is the "only difference between Section 304(b)(1)(B) and Section 304(b)(2)(B)." Petitioners' Brief, at 24 & n.20. Assuming *arguendo* that this reading of the Act is correct, then one could interpret section 301(c) as expressly providing for some BAT economic capability/effluent reduction benefit balancing on the individual facility level. Under section 301(c), the amount of money which an individual facility can afford to spend on pollution control technology must be balanced against the effluent reduction benefits achieved by that level of affordable pollution control technology in order to determine whether effluent limits less stringent than industry-wide BAT limitation levels should be established for that facility. Thus, Section 301(c) provides a balancing mecha-

nism in order to relieve the onerous inflexibility of nationally uniform, industry-wide BAT regulations.

Since EPA has authority to promulgate industry-wide BPT regulations only by analogy to its authority to promulgate industry-wide BAT regulations, and since the Act expressly provides for such an economic capability/effluent reduction balancing to adjust these more rigorous, industry-wide BAT regulations, then by analogy, BPT variance provisions should allow the variance applicant to perform and submit a similar analysis.<sup>24</sup> Contrary to the Government's position, such an approach to BPT variances is buttressed by and consistent with both the Act's express requirement of some form of industry-wide BPT cost-benefit balancing and EPA's acknowledgment that all BPT industry-wide factors are relevant to its BPT variance clause.<sup>25</sup>

<sup>24</sup> In *Weyerhaeuser*, the D.C. Circuit also agreed with the Fourth Circuit that this Court's *duPont* decision required EPA to "give permittees the ability to secure variances from the 1977 limitations analogous to their statutorily provided ability to secure the same with respect to the [BAT] limitations." 590 F.2d at 1034. In a footnote, the court noted that its conclusion was "somewhat different" from the Fourth Circuit's in *Appalachian Power*. Since it believed that the Act "reveals quite clearly" the relationship between section 301 (c) and 1984 BAT limitations, the D.C. Circuit only insisted "that the EPA's application of the 1977 variance allowance bear a similar relationship to the factors the statute deems crucial to the development of the general 1977 limitations." 590 F.2d at 1034 n.30. This distinction drawn by the *Weyerhaeuser* court may be one 'without a difference,' because *Weyerhaeuser* can only be read as implying that, under some circumstances, the 1977 BPT "total cost" factor requires consideration of economic capability. See 590 F.2d at 1036 & n.35.

<sup>25</sup> This court's opinion in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), also supports affirmance of the decisions

## II. THE DECISIONS OF THE COURT OF APPEALS ARE CONSISTENT WITH CONGRESSIONAL INTENT

### A. The Legislative History of the 1977 Amendments Supports the Decisions Below Because Congress Implicitly Sanctioned Both BPT Variances and Appalachian Power

The term "variance" appears several times in the legislative history to the 1977 Amendments to the Act. In most instances, the references arose in the context of an amendment to section 309 of the Act, which authorizes EPA to extend the date for BPT compliance until April 1, 1979. 33 U.S.C. § 1319(a)(5)(B) (Supp. I, 1977). Congress intended this mechanism for extending BPT compliance time to complement, not replace BPT variance provisions. As described by Senator Muskie, this amendment to section 309 was simply an attempt to relieve the inflexible compliance date for achieving BPT limitations without adding "a new layer of review" to that

below. In *Union Electric*, this Court held, *inter alia*, that when reviewing state implementation plans under the Clean Air Act, EPA may not consider the economic feasibility of the plan's requirement since economic feasibility is not encompassed within the specific statutory assessment criteria. 427 U.S. at 256-57. Under a similar analysis, EPA must give some consideration to a BPT variance applicant's economic capability of achieving industry-wide BPT limitations because "total cost," a statutory BPT consideration factor, as defined in the Act's legislative history, encompasses consideration of economic capability. Also, Congress made economic capability a consideration in Section 301(c), and those section 301(c) factors must apply by analogy to BPT variances. Finally, one must also note the similar importance of an adequate variance provision to this Court's *Union Electric* decision. See 427 U.S. at 266-67.



already provided by existing variance provisions. See [4] 1977 Leg. Hist. at 861-62. In fact, the relevant legislative history of the 1977 Amendments reveals that one purpose of these section 309 amendments was to allow EPA to grant BPT compliance-time extensions to facilities that raised "legitimate issues," involving either the "required technology" or "other points," through "established" "[a]ppeal mechanisms" such as administrative variance proceedings and judicial review thereof. See [4] 1977 Leg. Hist. at 693-94, 861-62, 1054; [3] 1977 Leg. Hist. at 408. Thus, a facility could apply for a BPT variance and a section 309 extension of the statutory deadline for BPT compliance.<sup>26</sup>

There is also no doubt that Congress in considering the 1977 Amendments was aware of the Fourth Circuit's *Appalachian Power* decision on which that court's subsequent *Crushed Stone* and *Consolidation Coal* decisions were based. In 1977, Congress rejected an amendment which would have conferred exclusive jurisdiction over the variance regulations remanded in *Appalachian Power*, and other EPA rules of nationwide impact, on the Court of Appeals for the District of Columbia Circuit. [4] 1977 Leg. Hist. at 873, 1012-29. The potential implications of passage of such an amendment on the Fourth Circuit's remand in *Appalachian Power* had been specifically brought to the attention of the Senate.<sup>27</sup>

<sup>26</sup> During the debate on the House bill, Representative Bonker noted congressional intent to extend the BPT compliance deadline for "industrial dischargers who have not completed their facilities due to bona fide challenges to the EPA's effluent limitations." Among the "bona fide" challenges justifying an extension of BPT compliance time was "EPA's delay in promulgating a meaningful variance procedure." [4] 1977 Leg. Hist. at 1314.

<sup>27</sup> See Federal Water Pollution Control Act Amendments of 1977, Hearings before the Subcommittee on Environmental

Congressional awareness and approval of the *Appalachian Power* holding are also evinced by two other aspects of the legislative history of the 1977 Amendments. First, Representative Clausen, ranking minority member of the Subcommittee on Water Resources, stated during the House debate on the Conference Report to the final 1977 amendments that "[a] full understanding of Public Law 92-500 [the 1972 Amendments] can only be achieved by having an understanding of the case law interpreting the public law." [3] 1977 Leg. Hist. at 374.<sup>28</sup> At the time Representative Clausen made this statement, only the *Appalachian Power* court had addressed the proper scope of a BPT variance provision; the D.C. Circuit had not reached its decision in *Weyerhaeuser*, and the *American Petroleum* and *NRDC v. EPA* courts had declined to rule on its interpretation and application. Consequently, this passage from the 1977 CWA legislative history indicates congressional approval of the analysis of the BPT variance provision contained in *Appalachian Power*. In fact, the case law Report cited by Representative Clausen concluded that, in regard to section 301(c) BAT modifications based in part on economic capability, "the language in [this Court's] *duPont* case would seem to

Pollution of the Senate Comm. on Environment and Public Works, 95th Cong., 1st Sess., Series 9-H25, Part 9, at 17 (1977).

<sup>28</sup> At this point during the House debate, Rep. Clausen referred to a Library of Congress report on case law under the 1972 FWPCA: "Case Law Under the Federal Water Pollution Control Act Amendment of 1977, Library of Congress, Congressional Research Service, House Public Works and Transportation Committee Print 95-35 (Report). [3] 1977 Leg. Hist. at 374. This Report was prepared in September 1977, before debate on the final CWA, and discusses both *Appalachian Power* and this Court's *duPont* decision. E.g., Report at 20, 28.



mandate similar provisions for 1977 limitations." Report at 20.<sup>29</sup> Thus, consistent with *Appalachian Power* and the decisions below, Congress clearly intended EPA to consider "potential cost to individual companies" when implementing the Act.

Second, when Congress disapproved of cases interpreting the Act, it did so explicitly in the legislative history of the 1977 Amendments.<sup>30</sup> Consequently, its failure to reject the *Appalachian Power* decision can only be construed as approval and acceptance of the Fourth Circuit's analysis of the BPT variance issue in that case.

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<sup>29</sup> Rep. Clausen also pointed out that

it is not the intent of this legislative effort to invest EPA with discretion in the interest of a precisely target [sic] series of regulatory activities, and then see this discretion nullified by agency shortcuts and across-the-board regulatory requirements. Constraints on agency manpower and other resources may well prove incentives to such an approach. *But it is intended that the Agency bear in mind the potential cost to individual companies, entire industries, and the economy at large to result if the act is not administered as intended by the Congress. As reflected by the conference report on [the CWA], these concerns are prominent among those motivating this legislation. Excessive regulation in the name of administrative convenience will not be tolerated. This concern will remain uppermost in mind as the Congress continues to exercise its legislative and oversight responsibilities in this field.*

[3] 1977 Leg. Hist. at 373 (emphasis added).

<sup>30</sup> See [4] 1977 Leg. Hist. at 693 (rejecting Sixth Circuit holding that some circumstances justified extension of BPT compliance time under FWPCA), 701 (rejecting Eighth Circuit holding that U.S. Corps of Engineers was exempt from State environmental law).

In general, the 1977 Amendments evince congressional intent to render the Act's effluent limitations more flexible at least in part because BPT had proven more stringent than anticipated. See [3] 1977 Leg. Hist. at 370 (House debate on Conference Report); [3] 1977 Leg. Hist. at 269 (Conference Report). Thus, although Congress did not explicitly address the BPT variance in the 1977 Amendments, its overall intent to make the Act more flexible<sup>31</sup> is consistent with the Fourth Circuit's requirement that BPT variance provisions also be flexible in their scope. And Congress' failure to enact an express BPT variance provision may be traced to its implicit approval of the decisions in *duPont* and *Appalachian Power*.

Ironically, the Government devotes an entire page of its Brief to passages from the 1977 Amendments' legislative history demonstrating Congress' concern over the Act's economic impact on industry. See Petitioners' Brief, at 41. The Government then concludes on the basis of this legislative concern that Congress determined not to "provide general exemptions or extensions for the 1977 deadlines." Petitioners' Brief, at 41-42. This conclusion, of course, misses the point since as the Government admits, BPT variances are not "exemptions or extensions" from 1977 BPT requirements, but instead redefine BPT for a particular point source. And, it also ignores the basic thrust of the 1977 amendments, which

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<sup>31</sup> Congress' continuing desire to render the Act still more flexible is evinced by currently pending legislation which under certain circumstances would require EPA to modify or withdraw effluent limitations which threaten unemployment because of plant closings. S. 2453, H.R. 6867, 96th Cong., 2d Sess. (1980) (printed in 126 Cong. Rec. S. 2656-S. 2657 (daily ed. March 19, 1980)).

was to provide greater flexibility to the Act. *See generally* [3] 1977 Leg. Hist. at 425, 497; [4] 1977 Leg. Hist. at 1315.

Finally, the Government's contention that any consideration of economic capability during the BPT variance process "would impose a substantial burden on" the Agency and "further delay implementation of the 1977 limitations", *see* Petitioners' Brief, at 42, ignores both Congress' express satisfaction with the degree of industrial compliance with the 1977 BPT limitations<sup>32</sup> and the probability that few BPT variances will be filed in the future because the 1977 BPT deadline is long past and point source dischargers in major industries will have to comply with BAT limitations for toxic pollutants and BCT limitations by July 1, 1984. 33 U.S.C. § 1311(b) (2) (C), (E) (Supp. I, 1977). *See generally* *NRDC v. Train*, 8 ERC 2120 (D.D.C. 1976), *as modified*, 12 ERC 1833 (D.D.C. 1979).

#### B. The Government Consistently Relies on Irrelevant Legislative History

In contrast to its deliberations prior to passage of the 1977 Amendments, Congress never directly addressed or considered BPT variances in drafting the 1972 Amendments to the Act, despite the Government's hyperbolic assertion that this legislative history

unequivocally shows that Congress intended EPA to set the 1977 limitations on an industry-wide basis

<sup>32</sup> *See, e.g.*, [3] 1977 Leg. Hist., at 323, 330, 369-70, 462-63, 478. It is worth noting that, contrary to the implication given in the Government's brief, Congress in its consideration of the 1977 Amendments repeatedly criticized EPA's administration of the Act. *See, e.g.*, [3] 1977 Leg. Hist. at 377-80, 381, 385, 386, 409.

and that neither Section 304(b) (1) (B) nor Section 301(c) requires EPA to grant variances from the 1977 limitations to individual point sources in financial difficulty.

Petitioners' Brief, at 30.<sup>33</sup>

In general, the Government's use of legislative history can be dismissed as falling into several different, but related categories of error. First, the Government cites numerous statements to the effect that Congress did not intend to exempt facilities from BPT limitations simply because they cannot afford to comply with those regulations. *See, e.g.*, Petitioners' Brief, at 28-29, 30, 34-36. The Fourth Circuit has never held, and the respondents have never argued, that a facility should receive a BPT variance simply because it cannot afford to comply with industry-wide BPT limitations. Second, the Government cites legislative history to the effect that every affected facility must achieve BPT and that it should not be modified or waived for economic reasons. *See, e.g.*, Petitioners' Brief, at 28, 31-34, 37-38. This argument misses the point. As the Government acknowledges in other sections of its Brief, the NPDES permit limitation received through a BPT variance does not "modify" BPT limitations for a particular facility; it is BPT for that

<sup>33</sup> Indeed, were the FWPCA legislative history so unequivocal on just the first assertion made in this passage, then this Court need not have rendered much of its *duPont* opinion. Moreover, the Government appears to have missed those parts of the legislative history of the 1972 Amendments which reflect an overall abiding concern that the cost of any pollution controls be reasonable and that the economic impact resulting from such controls be tolerable. *See, e.g.*, [1] 1972 Leg. Hist. at 231 (Rep. Jones), 350, 352 (Rep. Blatnik); [2] 1972 Leg. Hist. at 1272 (Sen. Randolph), 1281 (Sen. Bentsen). Affordability is an essential component of reasonable costs.

facility. Third, the Government cites legislative history relieving EPA from any duty to determine economic impact on a case-by-case basis. *See, e.g.*, Petitioners' Brief, at 31-34. But this discussion by the legislature was in the context of establishing industry-wide regulations and is contradicted by other portions of the FWPCA legislative history. *See duPont*, 430 U.S. at 131 n.21. Moreover, as discussed *infra* at 36-37, EPA need not perform such a case-by-case economic impact analysis in a variance proceeding because the burden is on the variance applicant to make this showing.

In addition to these categories of general error, some portions of the legislative history cited by the Government warrant specific comment. First, the Government accords great weight to a written statement Senator Muskie inserted into the record of the Senate's debate on the Conference Report on the 1972 Amendments to the Act. *See* Petitioners' Brief, at 33-34 & n.26. This statement, offered as an "explanation of each of the significant provisions of the Act," appears rather to have been an effort by the Senator to write his own gloss on agreements reached during the conference.<sup>34</sup> One commentator, noting contradictory Conference Report statements on the degree to which effluent limitations may vary with individual circumstances, observed that Senator Muskie "chose the half of the Conference Report he preferred, insisting that the modified bill provided for nationally uniform limitations based on BPT."<sup>35</sup> One portion of

<sup>34</sup> Senator Muskie's colleagues in both Houses strongly disagreed with aspects of this statement. *See, e.g.*, [1] 1972 Leg. Hist. at 105-08 (remarks of Rep. Dingell), 205 (remarks of Senator Jackson).

<sup>35</sup> Currie, "Congress, the Court and Water Pollution," 1977 S. Ct. Rev. 39, 51.

the 1972 legislative history ignored by Senator Muskie stated that

[i]n defining best practicable [technology] for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include [those listed in Section 304(b)(1)(B)]. . . . *In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant.*

[2] 1972 Leg. Hist. at 1468 (emphasis supplied).

Second, for some reason, the Government also dwells at great length on that section of the Act which established a loan fund to enable facilities to comply with its requirements. *See* Petitioners' Brief, at 28, 36-38 (citing section 8, 86 Stat. 898-99 (amending 15 U.S.C. § 636)). The Government apparently relies on a statement by Senator Nelson regarding this loan fund for the proposition that "Congress deliberately chose not to permit variances from the 1977 limitations on the ground of financial hardship." Petitioners' Brief, at 37. Senator Nelson's statement does not specifically address BPT variance provisions; rather, it appears to reject all economic variances from the Act's "pollution controls." Thus, Congress obviously did not agree with Senator Nelson that this loan fund was an "'alternative to . . . waiving strict environmental standards where economic hardship could be shown,'" Petitioners' Brief, at 37 (quoting [2] 1972 Leg. Hist. at 1355), because it expressly provided for modification of BAT limitations on economic grounds. 33 U.S.C. § 1311(c) (1976). Moreover, a BPT variance provision does not *waive* BPT limitations requirements; it redefines those requirements for an individual plant. Thus, a facility in compliance with BPT limitations granted through the variance process would be eligible

for these loans. See generally Petitioners' Brief, at 37-38. Also, as discussed previously, BPT variances may not be based solely on "financial hardship." Rather, economic capability is only one of a number of factors to be considered by the permit issuer in deciding on a BPT variance request. In any event, the availability of such loans merely demonstrates Congress' concern over the economic impact of its effluent limitations.<sup>36</sup>

**C. Consideration of Economic Capability in the BPT Variance Process Would Not Require EPA to Conduct "Plant-by-Plant" Economic Impact Determinations**

The Government recites legislative history stating that EPA need only determine the economic impact of its BPT limitations on classes or categories of industrial point source dischargers, not on individual facilities. See Petitioners' Brief, at 30-34. This legislative history is irrelevant because it pertains only to EPA's promulgation of industry-wide BPT effluent limitations; it does not address the extent of EPA's duty in the context of a BPT variance request to consider a discharger's economic capability to comply. See 590 F.2d at 1037 n.36.

Moreover, this part of the Government's argument completely ignores the process by which variance requests are determined and, therefore, raises an illusory issue. At the variance stage, EPA need not itself perform a plant-specific cost-benefit analysis or any other kind of

<sup>36</sup> As stated by Rep. Harrington during the debate on this funding section of the House Report: "No one in Congress wishes to legislate so irresponsibly that we drive out of business those who sincerely wish to abide by the new pollution laws but who, because of a bad state of the economy, will be forced to close." [1] 1972 Leg. Hist. at 450.

plant-specific economic impact analysis. *Appalachian Power*, 545 F.2d at 1360 n.23. Rather, the burden is on the variance applicant to present evidence on site-specific costs. *Weyerhaeuser*, 590 F.2d at 1037 n.36. See generally 40 CFR §§ 125.31, 125.32, 44 Fed. Reg. 32950-51 (June 7, 1979). The variance mechanism will be triggered only where the applicant can show a fundamental difference between it and the rest of the industry. Thus, EPA need only consider the evidence submitted by the applicant and compare it to the industry-wide cost-benefit comparison and other economic analyses already performed by the Agency in its rulemaking.<sup>37</sup> This approach to the variance process would not "place [the] impossible burden on EPA," which this Court strove to avoid in *duPont*. See generally 430 U.S. at 132. It is worth noting, in this regard, that the Government has not even presented this Court with the number of BPT variance requests which EPA has received.

Finally, as discussed previously, "total cost," including economic capability to comply, is only one factor relevant to a BPT variance determination. Other factors specified in section 304(b)(1)(B) may also warrant a BPT variance. Determination of fundamental differences with respect to these other factors could also be complicated and time consuming. Yet EPA admits that its variance must encompass those other factors and has not complained about the burden such determinations would place on it.

<sup>37</sup> Cf. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973) (EPA has no affirmative duty to make a quantified cost-benefit analysis under the Clean Air Act but must consider such studies when submitted by companies), cert. denied, 417 U.S. 921 (1974).



### III. THE AGENCY'S CONSTRUCTION OF THE PROPER SCOPE OF A BPT VARIANCE PROVISION IS NOT ENTITLED TO DEFERENCE

Only an Agency's consistent, long-standing, and substantially contemporaneous construction of a statute is entitled to "considerable" weight by a reviewing court. See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 718-19 (1975). And even when these conditions are met, the Agency's construction is "not controlling." 422 U.S. at 719. "[I]t is only one input in the interpretational equation," and "[i]ts impact carries more weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings." *Zuber v. Allen*, 396 U.S. 168, 192 (1969) (citations omitted) (emphasis added); accord, *SEC v. Sloan*, 436 U.S. 103, 117-21 (1978). Thus, deference to the Agency's construction of a statute is inappropriate when that construction is not longstanding, see *Teamsters v. Daniel*, 439 U.S. 551, 565-66 (1979), and any deference is always "constrained" by the court's "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Id.* at 566 n.20.

Contrary to statements in the Government's Brief, EPA has not consistently provided a "well articulated" interpretation of the BPT variance provision required by this Court's reading of the Act. On the contrary, it has repeatedly changed its view as to the proper scope of the provision.<sup>38</sup> After several permutations, EPA finally agrees with the court below that its variance provision must encompass all section 304(b)(1)(B) factors, including "total cost." Yet the Agency, at least in these cases, still ignores Congress' unambiguous intent that

<sup>38</sup> See generally text, *supra* at 6-8.

"total cost" include some consideration of economic capability. EPA's claims about its "consistent" construction of the proper scope of its BPT variance provision are rendered even more unreliable by the fact that, until the Government filed its brief on the merits of this case, EPA had argued to this Court that this issue was not ripe for judicial review.<sup>39</sup>

The interpretation of EPA's BPT variance provision put forward in the Government's brief also conflicts with prior Agency practice. For example, in *United States Steel*,<sup>40</sup> during administrative proceedings whose "proper inquiry" was whether a BPT variance was warranted, EPA presented and assessed evidence on, *inter alia*, the cost to a particular steel works of complying with industry-wide BPT limitation regulations. 556 F.2d at 844-46. In considering the costs of these regulations, EPA both compared their resulting capital costs to the facility's entire capital replacement costs and determined daily operating costs associated with meeting the regula-

<sup>39</sup> Until now, EPA argued that the proper scope and application of a BPT variance provision could not be determined by a court without reference to the record established in an actual variance proceeding. See Government Petition for a Writ of Certiorari, at 3, 20-21; Respondents' Brief, *Consolidation Coal v. Costle*, at 16-20. Indeed, EPA had unsuccessfully petitioned the Fourth Circuit to recall its mandate in *Appalachian Power* after this Court's *duPont* decision on the grounds that determination of its variance provision's proper scope would be speculative except in the context of an actual variance application. See No. 74-2096, Order of Sept. 26, 1977.

<sup>40</sup> EPA relies on *United States Steel* for its authority to set case-by-case NPDES permit limitations. See 44 Fed. Reg. 38763 (column 3) (July 2, 1979). This case and EPA's conduct of the variance proceedings at issue in this case were also noted with approval in the 1977 amendments' legislative history. See [4] 1977 Leg. Hist. at 862.



tions. 556 F.2d at 846 n.42. On the basis of these and other considerations, EPA determined the industry-wide BPT limitations to be "feasible" for that particular facility. 556 F.2d at 846. There is no discussion in *United States Steel* of the proposition that this plant's compliance costs/effluent reduction benefits ratio must be "fundamentally different" from the entire industry's before a variance could be granted, and EPA's actual reassessment of this plant's ability to comply with the industry-wide limitations can only be characterized as encompassing some consideration of whether the plant can afford those regulations, i.e., whether those industry-wide regulations are economically "feasible" for that particular plant.

Moreover, in processing an actual BPT variance request by the Jones & Laughlin Steel Corporation, EPA commissioned a financial consultant "to analyze the financial capability of Jones & Laughlin Steel Corporation . . . to afford BPT treatment facilities at its Aliquippa and Pittsburgh works."<sup>41</sup> Finally, EPA's reliance on legislative history stating that it is not required "to determine the economic impact of controls on any individual plant in a single community,"<sup>42</sup> conflicts not only with its actual practice in the *United States Steel* and Jones & Laughlin proceedings, but also with its general interpretation of the BPT variance provision as requiring a variance if "a discharger . . . could show that given its unique location and circumstances, adherence to the 1977

<sup>41</sup> See Written statement of Robert L. Hayes, TCS Financial Consultants, on behalf of the United States Environmental Protection Agency concerning the financial capabilities of the Jones & Laughlin Steel Corp., at 3 (March 30, 1979), in Appendix D at D-1.

<sup>42</sup> Petitioners' Brief, at 34 (quoting [1] 1972 Leg. Hist. at 170) (emphasis in the original).

limitations would be substantially more expensive . . . than compliance by other members of the same industry." Petitioners' Brief, at 10-11.

Finally, there is no indication either that EPA has ever presented its interpretation of this provision to Congress or that Congress has ever agreed with the Agency's interpretation. However, as demonstrated *supra*, there is evidence in the legislative history to the 1977 CWA amendments that Congress was aware of and approved the Fourth Circuit's holding in *Appalachian Power* that BPT variance provisions must allow some consideration of economic capability.

### CONCLUSION

For the foregoing reasons the decisions below should be affirmed in all respects.

Respectfully submitted,

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## APPENDICES

A-1

APPENDIX A

EPA 440/1-76/057-a

Development Document for Interim Final Effluent  
Limitations Guidelines and New Source Performance  
Standards for the

COAL MINING

Point Source Category

[EPA SEAL]

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY

May 1976

## SECTION V

## WASTE CHARACTERIZATION

The nature and quantity of pollutants discharged in waste water from surface and underground coal mining operations and coal preparation facilities varies significantly throughout the United States. The waste water situation evident in the mining segment of the coal industry is unlike that encountered in most other industries. Usually, most industries utilize water in the specific processes they employ. This water frequently becomes contaminated during the process and must be treated prior to discharge. In contrast, water is not utilized in the actual mining of coal in the U.S. at the present except for dust allaying and fire protection. Waste water handling and management is required in most coal mining methods or systems to insure the continuance of the mining operation and to improve the efficiency of the mining operation. Water enters mines via precipitation, groundwater infiltration, and surface runoff where it can become polluted by contact with materials in the coal, overburden material and mine bottom. This waste water is discharged from the mine as mine drainage which may require treatment before it can enter into navigable water. The waste water from coal mining operations is unrelated, or only indirectly related, to production quantities. Therefore, raw waste loadings are expressed in terms of concentration rather than units of production.

In addition to handling and treating mine drainage during actual coal loading or coal production, coal mine operators are faced with the same burden during idle periods. Waste water handling problems are generally insignificant during initial start-up of a new under-

ground mining operation. However, these problems continue to grow as the mine is expanded and developed and, unless control technology is employed may continue indefinitely as a pollution source after coal production has ceased. Surface mines can be somewhat more predictable in their production of waste water pollutants. Waste water handling within a surface mine can be fairly uniform throughout the life of the mine. It is highly dependent upon precipitation patterns and control technology employed, i.e.: use of diversion ditches, burial of toxic materials, and concurrent reclamation. Without the use of control measures at surface mines the problems of waste water pollution would also grow and continue indefinitely after coal production has ceased.

[183]

*Cost For Treating Coal Mine Discharges as Supplied to  
EPA Water Economic Branch*

The 40 CFR 434 established four subcategories for the industry:

Subpart A—Coal Preparation Plant Subcategory;

Subpart B—Coal Storage, Refuse Storage and Coal Preparation Plant Ancillary Area Subcategory;

Subpart C—Acid or Ferruginous Mine Drainage Subcategory;

Subpart D—Alkaline Mine Drainage Subcategory.

For the purpose of making an economic analysis of the impact to the coal mine industry for meeting the additional limitations required by the court order of December 16, 1975 (NRDC vs Train, Civ. Dkt. No. 1609-73) establishing additional limitations for the coal mining point source category the industry was segmented into model mines and preparation plants. These models were

supplied by the contractor who is preparing the draft economic analysis. (See Figure 41) A complete copy of this report is available through EPA Public Information Reference Unit, Room 2922 (EPA Library) Waterside Mall, 401 M Street, S.W. Washington, D.C.

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The selected approach for costs, cost factors and costing methodology for the model mine segments provided entailed the derivation costs for the various facilities and activities which, in combination, form the specified treatment processes. Where practical and applicable, the costs are shown as a function of variables which are generally known for specific mining operations (e.g. daily flow rate, size of impoundment area, amount of flocculant added per volume of waste water).

## APPENDIX B

ECONOMIC IMPACT  
OF  
EFFLUENT GUIDELINES

MINERAL MINING  
AND PROCESSING INDUSTRY

Construction Sand and Gravel  
Crushed Stone  
Industrial Sand  
Phosphate Rock

U.S. Environmental Protection Agency  
Office of Water Planning and Standards  
Washington, D.C. 20460

[I-4]

• • • •

The impact in each industry segment is analyzed by means of a model plant which describes the financial structure (revenues, normal operating costs, capital employed, net revenues, etc.) and the control costs required to meet the guideline standard. The model plants are used to estimate the impact for each segment. The following six levels of impact are analyzed:

1. *Price Effects*—the segment is analyzed in terms of competitive structure, price elasticity, availability of substitutes, etc., all of which will determine the ability of the plants in the segment to pass on the increased costs of operation;
2. *Financial Effects*—the expected shift in net revenues and capital requirements are analyzed to estimate the [I-5] number of plants in the segment which would be expected to close;



3. *Production Effects*—the impact of expected closures on production in the segment is analyzed;
4. *Employment Effects*—the employment impact of plant closures is assessed from the anticipated closures;
5. *Community Effects*—any expected employment or income loss because of plant closures is analyzed for its adverse impact on the region in which the closing plants are located; and
6. *Balance of Trade Effects*—a substantial shift in production or prices could hamper exports and/or encourage imports. Any such events would impact the nation's balance of trade. Most of the industries produce relatively low-value products that are not a significant part of the nation's foreign trade. Only phosphate rock has any potential impact on balance of trade.

The application of a general analysis to the specific problems of those industries is not without limitations. This study has attempted to recognize the limitations and to make assumptions that would overstate adverse economic impact generated by the imposition of the effluent guidelines.

7. *Industry Growth Effects*—any expected change in the projected industry growth rate is assessed from the impact of expected closures, which incorporates the expected shift in net revenues, capital requirements, and prices.

[I-6]

One of the principal limitations of the analysis is that the natural-resource base industries' costs of operations and control will depend on the specific site for each plant.

To a certain extent, each plant in the industry is a special case. The use of a model facility cannot take such specificity into account. Thus, the actual financial situation and control costs for any given plant may be different from the model used to represent it.

In many cases, information on the exact numbers of plants in each required analytical segment has not been available. Therefore, estimates were made as to the numbers of firms in each segment and those estimates are a significant factor in determining the expected economic impact.

All these limitations must be considered in light of the results. Very little adverse economic impact is anticipated; so small, in fact, that a doubling or tripling of impact would not make the national aggregate impact significant. However, each plant closure causes a significant adverse impact for its employees and potentially for the community that loses the jobs and incomes generated by the plant.

C-1

**APPENDIX C**

**DEVELOPMENT DOCUMENT  
FOR THE  
MINERAL MINING AND PROCESSING INDUSTRY**

**Douglas M. Costle  
Administrator**

**Thomas C. Jorling  
Assistant Administrator for  
Water and Hazardous Materials**

**Eckardt C. Beck  
Deputy Assistant Administrator for  
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**Robert B. Schaffer  
Director, Effluent Guidelines Division**

**Ronald G. Kirby  
Project Officer**

**July 1977**

**Effluent Guidelines Division  
Office of Water and Hazardous Materials  
U.S. Environmental Protection Agency  
Washington, D.C. 20460**

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[12]

TABLE 2  
DATA BASE

Subcategory	No. Plants	No. Plants		
		Visited	Data Available	Sampled
Dimension Stone	194	20	20	5
Crushed Stone	4,800			
Dray		5	52	*
Wet		26	130	9
Flotation	8	2	3	1
Shell Dredging	50	4	4	0
Construction Sand				
Gravel				
Dry	750	0	50	*
Wet	4,250	46	100	15
Dredging (on-land)	50	8	15	0
Dredging (on-board)	100	3	25	0
Industrial Sand				
Dry	20	0	5	*
Wet	130	3	10	2
Flotation	17	4	10	2
Acid Leaching	3	3	3	0
Flotation (HF)	1	1	1	1
Gypsum				
Dry	73	5	54	2
Wet Scrubbing	5	1	8	1
HMS	2	1	2	*
Asphaltic Minerals				
Limestone	2	0	2	*
Bituminous				
Oil Impreg.				
Diatomite	1	1	1	*
Gilsonite	1	1	1	1
Asbestos				
Dry	4	2	4	1
Wet	1	1	1	*
Woolastonite	1	1	1	*

\* There is no discharge of process waste water in the subcategories under normal operating conditions.

C-3

TABLE 2—Continued  
DATA BASE

Subcategory	No. Plants	No. Plants		
		Visited	Data Available	Sampled
Lightweight Aggregates				
Perlite	13	4	4	*
Pumice	7	2	7	
Vermiculite	2	2	2	*
Mica & Sericite				
Dry	7	5	7	*
Wet	3	2	3	*
Wet Beneficiation	7	5	7	*
Barite				
Dry	9	4	8	*
Wet	14	7	14	*
Flotation	4	3	4	1
Fluorspar				
HMS	6	4	6	*
Flotation	6	4	5	2
Drying and Pelletizing	2	1	2	*
Salines from Brine Lakes				
Lakes	3	3	3	*
Borax	1	1	1	*
Potash	5	4	5	*
Trona Ore	4	2	4	*
Phosphate Rock				
Eastern	22	21	20	5
Western	6	6	6	2
Rock Salt	21	11	15	3
Sulfur				
Anhydrite	2	1	2	*
On-Shore	9	7	9	5
Off-Shore	2	1	1	1
Mineral Pigments	11	3	3	*
Lithium Minerals	2	2	2	2

\* There is no discharge of process waste water in the subcategories under normal operating conditions.

Table 2—Continued

## DATA BASE

Subcategory	No. Plants	No Plants		
		Visited	Data Available	Sampled
Sodium Sulfate	6	2	2	*
Bentonite	37	2	2	*
Fire Clay	81	9	9	*
Fuller's Earth				
Attapulgit	10	4	5	2
Montmor.	4	3	3	3
Kaolin				
Dry		4	4	*
Wet	37 total	6	7	0
Ball Clay	12	4	4	0
Feldspar				
Wet	5	5	5	5
Dry	2	2	2	*
Kyanite	3	2	2	*
Magnesite	1	1	1	*
Shale and Common Clay	129	10	20	*
Aplite	2	2	2	*
Talc Minerals				
Dry	27	12	20	*
Washing	2	1	2	*
HMS, Flotation	4	4	4	4
Natural Abrasives				
Garnet	3	2	2	0
Tripoli	4	2	4	*
Diatomite	9	3	3	*
Graphite	1	1	1	0
Misc. Minerals				
Jade	est. 10	1	1	*
Novaculite	1	1	1	*
Total	11,019	312	735	77

\* There is no discharge of process waste water in the subcategories under normal operating conditions.

[18]

The crushed stone industry is widespread and varied in size of facilities and types of material produced. The size of individual firms varies from small independent producers with single facilities to large diversified corporations with 50 or more crushed stone facilities as well as other important interests. Facility capacities range from less than 22,700 kkg/yr (25,000 tons/yr) to about 13.6 million kkg/yr (15 million tons/yr). As Table 5 shows only about 5.2 percent of the commercial facilities are of a 816,000 kkg (900,000 ton) capacity or larger, but these account for 39.5 percent of the total output. At the other extreme, facilities of less than 22,700 kkg (25,000 ton) annual capacity made up 33.3 percent of the total number but produce only 1.3 percent of the national total. Geographically, the facilities are widespread with all States reporting production. In general, stone output of the individual States correlates with population and industrial activity as shown by Figure 2. This is true because of the large cost of shipment in relation to the value of the crushed stone.

[24]

The crushed stone and sand and gravel industries, on the basis of tonnage are the largest nonfuel mineral industries. Because of their widespread occurrence and the necessity for producing sand and gravel near the point of use, there are more than 5,000 firms engaged in commercial sand and gravel output, with no single firm being large enough to dominate the industry. Facility sizes range from very small producers of pit-run material to highly automated permanent installations capable of supplying as much as 3.6 million kkg (4 million tons) yearly of closely graded and processed products; the average commercial facility capacity is about 108,000

kkg/yr (120,000 tons/yr). As seen from Table 7 about 40 percent of all commercial facilities are of less than 22,600 kkg (25,000 tons) capacity, but together these account for only 4 percent of the total commercial production. At the other extreme, commercial operations with production capacities of more than 907,000 kkg (1 million tons) account for less than 1 percent of the total number of facilities and for 12 to 15 percent of the commercial production.

**APPENDIX D****WRITTEN STATEMENT  
OF**

Robert L. Hayes  
TCS Financial Consultants  
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Nashville, Tennessee 37203

**ON BEHALF OF THE**

United States Environmental Protection Agency  
concerning the financial capabilities of the  
Jones & Laughlin Steel Corporation

March 30, 1979

[3]

• • • •

**SCOPE OF THE ANALYSIS**

I have been requested by EPA to analyze the financial capability of Jones & Laughlin Steel Corporation (J&L) to afford BPT treatment facilities at its Aliquippa and Pittsburgh works.

• • • •



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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1979.

No. 79-770.

---

ENVIRONMENTAL PROTECTION AGENCY,  
APPELLANT,

*v.*

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.,  
APPELLEES.

---

DOUGLAS M. COSTLE, ADMINISTRATOR,  
ENVIRONMENTAL PROTECTION AGENCY,  
APPELLANT,

*v.*

CONSOLIDATION COAL COMPANY, ET AL.,  
APPELLEES.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT.

**Motion of New England Legal Foundation for Leave  
to File Brief as Amicus Curiae.**

Pursuant to Rule 42 of the Rules of the Supreme Court,  
New England Legal Foundation moves the Court for leave to  
file its brief as amicus curiae bound with this motion in sup-  
port of appellees.

2

New England Legal Foundation has the consent of counsel for appellant and counsel for appellees to the filing of this brief. Copies of appellees' and appellant's consent letters are filed with the Clerk of the Court.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the broad public interest. Policy for NELF is set by a board of directors composed of New England citizens, the majority of whom are attorneys. The board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

New England Legal Foundation's attorneys participated as amicus curiae in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (see 435 U.S. at 785, footnote 22); *Carey v. Brown*, 79-703 (1979) and *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York*, 79-134 (1979).

The Foundation, due to its unique public interest perspective and extensive work on environmental and economic issues, can provide the Court with additional arguments in this case.

The statutory background of the instant case is complex. Its legislative history is filled with controversy. The Foundation argues that basic principles of administrative regulation, as applied to an agency's actual record of enforcement of pollution controls, should guide this Court's decision. The Foundation is concerned that the enforcement of the Environmental Protection Agency's inflexible variance provision will unnecessarily jeopardize the economic health of the New England community. It is NELF's position that the Court of Appeals decision, rejecting the Environmental Protection Agency's variance provision, should be affirmed.

3

For the foregoing reasons New England Legal Foundation respectfully requests permission to participate as amicus curiae and to file the attached brief in support of appellees.

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IN THE  
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ENVIRONMENTAL PROTECTION AGENCY,  
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DOUGLAS M. COSTLE, ADMINISTRATOR,  
 ENVIRONMENTAL PROTECTION AGENCY,  
 APPELLANT,

*v.*

CONSOLIDATION COAL COMPANY, ET AL.,  
 APPELLEES.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
 FOR THE FOURTH CIRCUIT.

**Brief of Amicus Curiae New England Legal Foundation  
 in Support of Appellees.**

**Questions Presented.**

1. In cases of complex administrative regulation, does the enforcement of uniform standards require a formal pro-

cedure for considering waivers in special circumstances?

2. In the instant case, do substantially divergent costs of compliance or extraordinary economic hardship arising from enforcement of uniform effluent standards constitute special circumstances worthy of consideration in a variance application?

3. If an individual discharger cites an extraordinary economic burden of compliance in an application for a waiver, does the Environmental Protection Agency's narrow obligation of fair consideration render the Federal Water Pollution Control Act unenforceable?

**Statement of Facts.**

The Federal Water Pollution Control Act ("the Act")<sup>1</sup> prohibits discharge of any pollutant into navigable waters, unless the pollutant discharger complies with effluent standards that are promulgated under the Act. 33 U.S.C. § 1311(a). These effluent standards are based upon the technology of pollution control. Section 301(b) of the Act directs that effluent limits for existing point sources be established in two successive stages. 33 U.S.C. § 1311(b).

First, by 1977, industrial dischargers must comply with effluent limits based upon the level of clean-up achieved by "the best practicable control technology currently available" (BPT). Section 301(b)(1)(A). BPT is based upon "the average of the best existing performance of plants of various sizes, ages, and unit processes within each industrial category."<sup>2</sup>

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<sup>1</sup> The Federal Water Pollution Control Act (P.L. 92-500) as amended by the Clean Water Act of 1977 (P.L. 95-217).

<sup>2</sup> Senate Conference Committee Report on S.2770, October 4, 1972, in 1 *Legislative History of the Water Pollution Control Amendments of 1972*, Ser. No. 93-1, at page 169 (Comm. Print 1973). (Hereafter "Leg. His.")

Subsequently, by 1987, more stringent effluent limits are to be established. These standards will be based upon the degree of clean-up achieved by the "best available technology economically achievable" (BAT). BAT will be based upon "the best performer in any industrial category." 1 Leg. His. at 170.

Section 304(b)(1)(B) of the Act requires the Administrator of the Environmental Protection Agency (EPA or "Agency"), in his determination of BPT, to consider the following factors: "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, . . . the age of the equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." 33 U.S.C. § 1314(b)(1)(B).

Section 304(b)(2)(B) of the Act requires that the Administrator, in his determination of BAT, consider the same factors, but with one exception. Rather than balancing the total cost of application of the technology against the effluent reduction benefits, the Administrator must take into account "the cost of achieving such effluent reduction." 33 U.S.C. § 1314(b)(2)(B).

The Act further establishes a system of permits that transforms these generally applicable effluent limitations into specific compliance obligations of individual dischargers. *EPA v. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). No one can discharge pollutants into waters without such a permit. Permits incorporate the effluent limitations promulgated by EPA under § 301(b). 33 U.S.C. § 1342(a)(1). They are issued by EPA or an authorized state agency. 33 U.S.C. § 1342(a-d). A discharger, at the time of

application for a permit, may also request a variance from the applicable 1977 or 1987 effluent limitations set pursuant to § 301(b).

Section 301(c) of the Act states those criteria that EPA shall rely upon in evaluating applications for a variance from the later 1987 standards. 33 U.S.C. § 1311(c). The Act does not, however, state what EPA must consider in granting a variance from the initial 1977 limits.

According to § 301(c) of the Act, EPA may modify the 1987 standards as they apply to a particular point source discharger. These modified requirements must correspond to the maximum use of technology "within the economic capability of the [discharger]." They must result in "reasonable further progress toward the elimination of the discharge of pollutants." Based upon these statutory provisions, EPA will consider the "economic capability or affordability" of specific dischargers in granting waivers to the 1987 limits. 43 Fed. Reg. 50042 (1978).

In the absence of statutory criteria for granting a variance to the 1977 standards, EPA promulgated a regulation pursuant to its rule-making authority. 40 C.F.R. 423.12(a). Under this regulation, a discharger may obtain a variance from the 1977 limits only if "factors relating to the equipment or facilities involved, the process applied or other such factors related to such discharger are fundamentally different from the factors considered in [setting the 1977 limitations]." See, e.g., 42 Fed. Reg. 21380. In 1974, EPA limited this provision's application to cases involving "factors of a technical and engineering nature." The Agency specifically excluded "economic factors" from consideration. 39 Fed. Reg. 30073. EPA subsequently modified its position. "[A] plant may be able to secure a [1977 limitations] variance by showing that the plant's own compliance costs with the national guideline limitation would be  $x$  times greater than

the compliance costs of the plants EPA considered in setting the [1977 limitations]. A plant may not, however, secure a variance by alleging that the plant's own financial status is such that it cannot afford to comply with the [1977 limitations]." 43 Fed. Reg. 50042 (1978).

New England Legal Foundation adopts appellees' description of the opinions below.

### Summary of Argument.

New England Legal Foundation argues as follows. In cases of complex administrative regulation, the enforcement of uniform standards requires a formal procedure for considering waivers in special circumstances. In the instant case, substantially divergent costs of compliance and extraordinary economic hardship arising from enforcement of uniform effluent standards are both special circumstances worthy of consideration in a variance application. When an individual discharger cites an extraordinary economic burden of compliance in its application for a waiver from 1977 or 1987 effluent standards, the EPA's narrow obligation of fair consideration does not render the Act unenforceable.

### Argument.

#### I. IN CASES OF COMPLEX ADMINISTRATIVE REGULATION, THE ENFORCEMENT OF UNIFORM STANDARDS REQUIRES A FORMAL PROCEDURE FOR CONSIDERING WAIVERS IN SPECIAL CIRCUMSTANCES.

An administrative agency may implement laws within its jurisdiction by promulgating generally applicable rules. *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969). The conditions of compliance with these rules may vary somewhat from one regulated entity to another, so long as these differences result in "strains rather than injustice."

*American Importers Association v. CAB*, 473 F. 2d 168, 174 (D.C. Cir. 1972). "[The] power to regulate is not a power to destroy." *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886).

An agency's discretion to proceed in difficult areas through general rules is "intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, *supra* at 1157; accord, *Federal Power Comm'n v. Texaco, Inc.*, 377 U.S. 33, 40 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 204-205 (1956); *National Broadcasting Company v. United States*, 319 U.S. 190, 219-220 (1943); *International Harvester Company v. Ruckelshaus*, 478 F. 2d 615, 641 (D.C. Cir. 1973); *WBEN, Inc. v. United States*, 396 F. 2d 601, 618 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968); *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F. 2d 624, 628-629 (D.C. Cir.) (*en banc*), *cert. denied*, 385 U.S. 843 (1966). The administration of a uniform licensing rule did not excuse the Federal Communications Commission from fairly considering an application for a variance that was consistent with the agency's "public interest" mandate. *WAIT Radio v. FCC*, *supra* at 1158. The existence of uniform emissions standards did not excuse the EPA from fairly considering an application for extension when timely enforcement might have extraordinary, industry-wide economic consequences. *International Harvester Company v. Ruckelshaus*, *supra* at 632-639. The administration of uniform pricing formulas was constitutionally permissible so long as the Federal Power Commission provided consideration of special relief for hardship cases. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784-787 (1968).

As these cases demonstrate, "special circumstances" arise when mechanical application of the general rule runs counter to the rationale of the rule or the mission of the agency, when

the overall benefits of enforcement are substantially outweighed by its costs, or when the rule's application to an individual regulated entity would cause extraordinary economic hardship. See also *WAIT Radio v. FCC*, *supra* at 1159; *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F. 2d 672, 680-681 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972); *Portland Cement Association v. Ruckelshaus*, 486 F. 2d 375, 399 (D.C. Cir.), *cert. denied*, 417 U.S. 921 (1974); *Gulf Oil Corporation v. Hickel*, 435 F. 2d 440, 447 (D.C. Cir. 1970). Such "special circumstances" are an inevitable consequence of an agency's limited resources to fashion exact rules for a large number of regulated entities, even when statutory provisions for rule making apparently provide sufficient flexibility. *Portland Cement Association v. Ruckelshaus*, *supra* at 399.

## II. IN THE INSTANT CASE, SUBSTANTIALLY DIVERGENT COSTS OF COMPLIANCE AND EXTRAORDINARY ECONOMIC HARDSHIP ARISING FROM ENFORCEMENT OF UNIFORM EFFLUENT STANDARDS ARE BOTH SPECIAL CIRCUMSTANCES WORTHY OF CONSIDERATION IN A VARIANCE APPLICATION.

The requirement of a formal variance mechanism for special circumstances applies equally well to EPA's promulgation of effluent limits under both the 1977 and the 1987 provisions of the Federal Water Pollution Control Act. *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 128 (1977). The formal waiver procedure must be sufficiently flexible to accommodate these special circumstances. *Weyerhaeuser Co. v. Costle*, 590 F. 2d 1011, 1032 (D.C. Cir. 1978).

To characterize these special circumstances precisely, we must examine EPA's actual record of enforcement of the Act. The sheer number of different point sources potentially

subject to regulation made it impossible for EPA, with its limited resources, to formulate exact fitting effluent limitations.<sup>3</sup> Hence, EPA resorted to sampling. *Natural Resources Defense Council, Inc. v. EPA*, 537 F. 2d 642, 647 (2d Cir. 1976). Pursuant to §§ 301 and 304 of the Act, the Agency contracted different private consultants to analyze the technical conditions of effluent reduction in sample firms in a given industrial category, and then partitioned each category into subcategories according to the production process applied.<sup>4</sup> When EPA became aware of other production processes in an industry for which it had no sample observations, the Agency created the requisite additional subcategory and extrapolated BPT-based effluent standards from other industries. *American Meat Institute v. Environ. Protect. Agcy.*, 526 F. 2d 442, 453 (7th Cir. 1975). As a result of court order, EPA was compelled to set some effluent limits in extreme haste. *Natural Resources Defense Council, Inc. v. Train*, 510 F. 2d 692, 704 (D.C. Cir. 1975). Commenting on EPA's progress toward implementation of the Act, the National Commission on Water Quality noted that many effluent limits

<sup>3</sup> The EPA Administrator himself noted that there is no way that anyone sitting in Washington can properly prepare a document which specifies the effluent limitations for all of the tens of thousands of plants around the country because every plant involves factors which differentiate it from others and directly affect what will be the BPT for that plant. 3 *Envir. Rep.* 706 (1972). See also *Portland Cement Association v. Ruckelshaus*, 486 F. 2d at 399.

<sup>4</sup> By 1977, EPA had divided some industries into as many as 51 subcategories based upon the production process applied. Council on Environmental Quality, Eighth Annual Report (1977) at 38. For example, tissue paper mills using the bleached kraft process are subject to different effluent limitations than those using the deinking process. Koch and Leone, *The Clean Water Act: Unexpected Impacts on Industry*, 3 *Harv. Env. L.R.* 84, 107 (1979).



were too simplistic and often required a "force-fit" for individual plants.<sup>5</sup>

As a result, extremely wide variations in both the costs of compliance and the severity of the economic burden of compliance have been the rule and not the exception.<sup>6</sup> In the tissue industry, costs of compliance with BPT limits ranged from \$1.85 per ton to \$82.82 per ton in 1974, with an average of \$9.40 per ton.<sup>7</sup> In the electric power industry, capital costs of compliance with thermal pollution controls varied from \$9.00 per kilowatt to \$81.00 per kilowatt.<sup>8</sup> A number of studies have shown that the incremental cost of discharge treatment rises extremely rapidly as the 90-95 percent clean-up level is approached.<sup>9</sup> If the best practicable control technology, i.e., "the average of the best existing performance,"<sup>10</sup> achieves treatment levels far beyond what other dischargers in the subcategory can achieve, the resulting divergence in costs could be substantial. This appears to be the case in the pulp and paper industry.<sup>11</sup>

<sup>5</sup> National Commission on Water Quality, Report to Congress, 1976, p. 8. As a remedy, the Commission recommended greater flexibility and discretion by the Administrator.

<sup>6</sup> See the studies of the petroleum refining, pulp and paper, textile, aluminum and metal finishing industries in Leone (ed.), *Environmental Controls*, 1976, at 25, 45, 89, 100, 101, 103 and 110.

<sup>7</sup> Leone and Jackson, "The Political Economy of Federal Regulatory Activity," in Fromm (ed.), *Public Regulation of Economic Activity*, 1979; also, Koch and Leone, *supra*, note 2 at 91.

<sup>8</sup> Brief for Petitioners, *Appalachian Power Co., et al. v. Train*, at 31-33 and 2 App. 648.

<sup>9</sup> For example, Kneese and Kneese, *The Economics of Water Utilization in the Sugar Beet Industry*, 1968. The cost of treating the last five percent of pollutants may equal or exceed the total cost of treating the first 95 percent.

<sup>10</sup> Leg. His. at 169.

<sup>11</sup> Rauch, Note, *The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 Harv. J. Leg. 565, 579 (1973).

Abatement costs, it has been shown, are strongly related to plant age and size.<sup>12</sup> Although these classifying factors were explicitly authorized in 1977 by this Court in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. at 130-132, they had not been fully considered by EPA. Of the approximately 4000 major industrial dischargers nationwide, more than 600 failed to meet the July 1977 deadline for compliance with BPT-based limits.<sup>13</sup> Those who failed were mostly older plants with large local payrolls, often clustered in specific geographic areas or industries.<sup>14</sup> Nearly 50 percent of the nation's iron and steel plants failed to meet the deadline.<sup>15</sup> To avoid plant closings and unemployment among steel producers in Mahoning Valley, near Youngstown, Ohio, EPA was compelled to subcategorize iron and steel plants in that area. The Agency then promulgated less stringent standards for this subcategory than those applicable to the rest of the industry.<sup>16</sup>

These facts demonstrate that extremely wide variations in the economic burden of compliance have not necessarily arisen from identifiable engineering features that are "fundamentally different than the factors considered [in setting the 1977 limitations]." 42 Fed. Reg. 21380. In many cases, they have arisen from EPA's inability, in the face of limited

<sup>12</sup> Koch and Leone, *supra* at 107.

<sup>13</sup> See Testimony of Thomas C. Jorling, EPA Assistant Administrator for Water and Hazardous Materials before the Senate Committee on Environmental and Public Works as reported by Senator Muskie, 123 Cong. Rec. S.13,535 (daily ed., Aug. 4, 1977).

<sup>14</sup> Voytko, *The Clean Water Act and Related Developments in the Federal Water Pollution Control Program During 1977*, 2 Harv. Env. L.R. 103, 104-105 (1977).

<sup>15</sup> See 123 Cong. Rec., S.13,539 (daily ed., Aug. 4, 1977) remarks of Senator Muskie.

<sup>16</sup> Regulatory Policy Committee, U.S. Department of Congress, *Toward Regulatory Reasonableness*, 1977, at 45, 59.



resources, to consider fully those factors already enumerated in § 304(b)(1)(B) of the Act.

The granting of waivers is not dictated merely because "high cost operators may be more seriously affected . . . than others." *Permian Basin Area Rate Cases*, 390 U.S. at 769, citing *Bowles v. Willingham*, 321 U.S. 503, 518 (1944). But the extremely wide variations in the economic burden of compliance in this case clearly establish the presumption that mechanical application of uniform standards is likely to impose an inequitable and confiscatory burden on a significant number of plants. In light of this presumption, EPA is obligated to consider the economic burden of compliance as evidence of "special circumstances" warranting the granting of a variance.

Contrary to its original exclusion of "economic factors" from consideration in a variance application (39 Fed. Reg. 30073), EPA will now consider a showing that "adherence to the 1977 limitations would be substantially more expensive than compliance by other members of the same industry." Petitioner's Brief at 10-11. See also 44 Fed. Reg. 32894 (1979); 43 Fed. Reg. 50042 (1978). The Agency draws a distinction between this type of evidence and the allegation that a discharger-applicant simply cannot afford to comply with the limitations. Petitioner's Brief at 11; 43 Fed. Reg. 50042 (1978). EPA bases this distinction on its statutory interpretation that § 301(c), allowing waivers according to "the economic capability of the [discharger]," applies only to the 1987 limitations.

Since EPA has already agreed to consider substantial differences in the cost of compliance, the only case at issue is where a business potentially hard hit by the BPT-based limits cannot demonstrate a substantial cost difference or other special circumstance. Yet the economic consequence of business shutdown would alone establish a significant cost

differential. To enforce this distinction, EPA must therefore rule out the possibility that the compliance will lead to an applicant's business failure. But this cannot be accomplished by exclusion of "affordability" or "financial status" from consideration in a waiver application. Both extraordinary compliance costs and extraordinary hardships are potentially special circumstances that require a flexible rather than a categorical approach to enforcement. The distinction between them is arbitrary.

### III. WHEN AN INDIVIDUAL DISCHARGER CITES AN EXTRAORDINARY ECONOMIC BURDEN OF COMPLIANCE IN ITS APPLICATION FOR A WAIVER FROM 1977 OR 1987 EFFLUENT STANDARDS, EPA'S NARROW OBLIGATION OF FAIR CONSIDERATION DOES NOT RENDER THE ACT UNENFORCEABLE.

EPA's consideration of the economic burden of compliance is not a license to avoid the Act's strict effluent standards. *Weyerhaeuser Co. v. Costle*, 590 F. 2d at 1035. It merely allows the petitioning firm to present to the Agency its economic concerns. The discharger-applicant, and not the EPA, has the burden to determine the economic impact of the effluent standards and to present the information convincingly in a variance application. EPA is not compelled to undertake cost/benefit analysis. A discharger's demonstration that compliance with BPT-based limits imposes extraordinary costs does not automatically yield him a variance. The narrow obligation of the Agency is to consider the costs of compliance as one of many factors. *Appalachian Power Co. v. Train*, 545 F. 2d 1351, 1359-1360 (4th Cir. 1976).

A variance procedure that is sensitive to the economic burden of compliance will not degenerate into unworkable, case-by-case regulation. The record of enforcement of the Act demonstrates the importance of flexibility in the admin-

istration of general rules. EPA is obligated to balance the goal of uniformity against this flexibility requirement. Because such desired flexibility will require consideration of special circumstances, some degree of case-by-case enforcement is likely. But the fair consideration of economic hardship cases is only one element in the achievement of administrative flexibility. There is no showing in this case that fair consideration of economic impact will by itself overburden the enforcement of the Act. Congress's belief that consideration of a discharger's "cost of achieving effluent reduction" would not disarm the Act is demonstrated by its explicit imposition of such a requirement in the Act's 1987 variance procedure.

#### **Conclusion.**

The statutory background of this case is complex. Its legislative history is filled with controversy. New England Legal Foundation argues that basic principles of administrative regulation, as applied to an agency's actual record of enforcement of pollution controls, should govern this Court's decision.

The Court below should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-770

ENVIRONMENTAL PROTECTION AGENCY,  
PETITIONER

v.

NATIONAL CRUSHED STONE ASSOCIATION,  
ET AL.

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DOUGLAS M. COSTLE, ADMINISTRATOR,  
ENVIRONMENTAL PROTECTION AGENCY,  
PETITIONER

v.

CONSOLIDATION COAL COMPANY, ET AL.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONERS

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As this Court concluded in *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 116-136 (1977), the Clean Water Act, 33 U.S.C. 1251 *et seq.*, directs the Administrator to establish two sets of increasingly stringent effluent limitations (the "1977 limitations" and the "1987 limitations"). Section 301(c) of the Act states that an individual discharger may



obtain a variance from the 1987 limitations based on its economic circumstances so long as the modified 1987 standard represents reasonable further progress beyond the 1977 limitations.<sup>1</sup> Respondents concede (Resp. Br. 24) that Section 301(c) does not apply to the 1977 limitations, and no other express variance provision governs the 1977 limitations. The question posed by this case is whether, notwithstanding that omission, EPA must consider an individual discharger's inability to afford compliance with the 1977 limitations as a basis for lowering the standard in his case.<sup>2</sup>

1. *Section 304(b)(1)(B) of the Act does not require EPA to consider an individual discharger's ability to afford compliance with the 1977 regulations*

Respondents' primary submission (Resp. Br. 17-23) is that Section 304(b)(1)(B) implicitly requires EPA to make the same kind of individualized determination regarding a discharger's financial ability to comply with the 1977

Section 301(c) does not apply to "conventional" (33 U.S.C. (Supp. II) 1311(b)(2)(E)) and "toxic" (33 U.S.C. (Supp. II) 1311(b)(2)(C)) pollutants. See 33 U.S.C. (& Supp. II) 1311(c), 1311(f).

Relying on its prior decision in *Appalachian Power Co. v. Train*, 545 F. 2d 1351 (4th Cir. 1976), the court of appeals held that the variance clause promulgated by EPA with regard to the 1977 limitations must be at least as flexible and as broad as Section 301(c). See Pet. App. 33a-34a; 545 F. 2d at 1359-1360. Therefore, in the court of appeals' view, EPA must grant a variance from either the 1977 or the 1987 limitations, if the variance requires maximum use of technology within the economic capability of the discharger and represents reasonable progress toward eliminating pollution. In light of their concession that a discharger is not "entitled to a BPL [1977] variance simply because it is financially troubled" and that the 1977 limitations variance clause need not "be identical to Section 301(c)" (Resp. Br. 10), respondents apparently do not fully support the broad holding of the court of appeals. Rather, respondents argue (Resp. Br. 10, 24) that a discharger's inability to comply with the 1977 limitations is merely a nondeterminative factor in the variance process.

limitations that Section 301(c) explicitly requires with regard to the 1987 limitations.<sup>3</sup> Respondents argue that section 304(b)(1)(B) directs EPA to assess the "total cost" of implementation—including adverse socio-economic impacts—in setting the 1977 limitations in the first instance, and that as part of the variance process EPA must reconsider every factor it initially considered. We disagree.

a. First, respondents' contention proves too much. To be sure, Section 304(b)(1)(B) mandates "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application" as a factor in setting the 1977 limitations. But even assuming that "cost" as used in Section 304(b)(1)(B) includes indirect social and economic costs,<sup>4</sup> nothing in the

<sup>3</sup> Respondents also contend (Resp. Br. 23-26) that Section 301(c) somehow applies to the 1977 limitations by analogy. This argument appears premised on an erroneous reading of the Court's decision in *duPont v. Train*, *supra*. There, the Court analyzed the relationship between the 1977 limitations and the 1987 limitations, as well as the language, legislative history and administrative interpretation of the Act, in reaching its conclusion that Congress intended EPA to issue both the 1977 and 1987 limitations on an industry-wide and not a plant-by-plant basis (430 U.S. at 124-136). We agree that a comparison of the provisions governing the two limitations requirements may elucidate the meaning of the Act in particular cases; in fact, here the purposeful failure of Congress to extend the coverage of Section 301(c) to the 1977 limitations strongly evidences congressional intent to bar EPA from modifying the 1977 limitations on affordability grounds. But nothing in the *duPont* opinion suggests that the 1977 limitations must be treated like the 1987 limitations for all purposes. To the contrary, the *duPont* opinion expressly recognizes that Section 301(c) applies only to the 1987 limitations. 430 U.S. at 121, 127 n.17.

<sup>4</sup> The phrase "total cost of application" suggests that Congress perhaps was referring only to the financial outlay involved in actually applying the technology. But see 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 231 (Comm. Print 1973) (hereinafter "Leg. Hist.") (remarks of Rep. Jones). In any event, the Administrator has broad discretion under Sections 304(b)(1)(B) and 304(b)(2)(B) to consider any relevant factor in

language of the section suggests EPA must reconsider those indirect costs on a plant-by-plant basis or must otherwise evaluate the financial condition of individual dischargers. To the contrary, "cost" is also a factor to be considered in setting the 1987 limitations (see Section 304(b)(2)(B), 33 U.S.C. (& Supp. II) 1314(b)(2)(B)), but Congress nonetheless deemed it necessary to enact an express variance provision with regard to the 1987 limitations. If respondents were correct that, by specifying "cost" in the broadest sense, as a factor in initially fixing the limitations, Congress meant to require a reassessment of the same "costs" for each discharger, no such variance provision would have been necessary. Cf. *Mohasco Corp. v. Silver*, No. 79-616 (June 23, 1980), slip op. 18; *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

b. We further observe that respondents' argument is premised on a basic misunderstanding of the standard variance clause promulgated by EPA with regard to the 1977 limitations. Because EPA cannot evaluate the characteristics of every discharger in a particular industry prior to setting the applicable 1977 limitation,<sup>5</sup> the effluent limitations are necessarily based on general surveys of each

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establishing the 1977 and 1987 limitations. See 33 U.S.C. (& Supp. II) 1314(b)(1)(B), 1314(b)(2)(B). Pursuant to this authority, EPA estimates the number of business closings that may result from requiring a particular level of technology, thereby ensuring that the 1977 limitation ultimately chosen will not cause a massive shut down of a particular industry. See, e.g., *American Iron & Steel Institute v. EPA*, 568 F. 2d 284, 302-304 (3d Cir. 1977). Because the 1977 limitations are ordinarily based on the "average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category" (1 Leg. Hist. 169 (remarks of Sen. Muskie)), the applicable 1977 limitation is by definition affordable by most, if not all, members of the particular industry.

<sup>5</sup>For example, there are approximately 4800 crushed stone and 5000 sand and gravel facilities nationwide (Pet. App. 4a).

industry. See *Weyerhaeuser Co. v. Costle*, 590 F. 2d 1011, 1019-1020 (D.C. Cir. 1978); 44 Fed. Reg. 32893 (1979). In accordance with the decision of this Court in *duPont v. Train*, *supra*, 430 U.S. at 128,<sup>6</sup> EPA has consistently held that variances from the 1977 limitations are permissible in limited circumstances. Thus, EPA will grant a variance to a discharger that demonstrates that its fiscal cost of actual compliance or the nonwater environmental costs associated with its compliance are substantially greater than the comparable costs for the average industry discharger, provided that such increased costs are attributable to fundamental differences between the characteristics of its plant and the industry-wide characteristics projected by EPA in setting the applicable limitations. See, e.g., *In re Louisiana-Pacific Corp.*, 10 E.R.C. 1841, 1843-1844, 1850-1853 (1977) (Decision of the Administrator); 44 Fed. Reg. 32893-32894 (1979); 43 Fed. Reg. 50042 (1978).

However, contrary to respondents' repeated assertions (Resp. Br. 11, 18, 26), it has never been EPA's position that as part of the variance process it will reconsider *every* factor that may have been considered in setting the particular 1977 limitation. Rather, EPA's variance policy makes clear that a discharger may be entitled to a variance "if the *relevant* statutory factors relating to that discharger are shown to be fundamentally different from those previously considered by EPA." 44 Fed. Reg. 32893 (1979) (emphasis supplied). Based on the language and legislative history of the Act described in our opening brief, EPA has consistently and unequivocally concluded that an individual discharger's

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<sup>6</sup>Even prior to that decision, EPA had determined to permit some variances, although not on the ground of economic hardship. See 430 U.S. at 122-123. Although the Court in *duPont* agreed with EPA that "some allowance [should be] made for variations in individual plants" (*id.* at 128), it declined to review the scope of the variance clause then in existence. See *id.* at 128 n.19.

bility to afford compliance is simply not a relevant factor. See, e.g., *ibid.*; 43 Fed. Reg. 50042 (1978). Indeed, since EPA (as well as Congress) assumes that some marginal businesses may not be able to afford compliance with the 1977 limitations, it is apparent that the mere economic trouble of an individual discharger cannot be a "fundamentally different" factor to be reconsidered at the variance stage. And, notwithstanding respondents' persistent mischaracterization of the decision in *Weyerhaeuser Co. v. Costle*, *supra* (see Resp. Br. 21-22, 26 n.24; Br. in Opp. 7-8), the District of Columbia Circuit has upheld EPA's standard variance clause, explicitly concluding that although a discharger's comparative fiscal cost of compliance is a relevant factor in a variance proceeding, its inability to afford compliance is not. See 590 F. 2d at 1035-1037; F. Grad, *Treatise on Environmental Law* § 3.03, at 3-120.10(4) to 3-120.10(5) (1979). See also *California & Hawaiian Sugar Co. v. EPA*, 553 F. 2d 280, 289-290 (2d Cir. 1977); *American Petroleum Institute v. EPA*, 540 F. 2d 1023, 1032-1033 (10th Cir. 1976); *American Iron & Steel Institute v. EPA*, 526 F. 2d 1027, 1051-1052 (3d Cir. 1975).<sup>7</sup>

<sup>7</sup> Respondents also assert (Resp. Br. 39-40) that EPA's variance clause conflicts with EPA's actual practice. This claim is without merit. In *United States Steel Corp. v. Train*, 556 F. 2d 822, 844-847 (7th Cir. 1977), the question presented was whether the discharger's relative cost and difficulty of compliance was based on alleged fundamental differences, and not whether United States Steel could afford compliance. Moreover, in *Jones & Laughlin Steel Corp.*, Doc. Nos. PA-AH-0053, PA-AH-0072 (EPA Reg. III), EPA obtained a financial report regarding the discharger because the administrative law judge agreed to hear evidence regarding the discharger's ability to afford compliance over EPA's repeated objections.

2. *The legislative history of the Act compels the conclusion that Congress did not intend that EPA modify the 1977 limitations on the basis of economic distress*

Respondents conclusorily assert (Resp. Br. 33-36) that the contemporaneous legislative history cited in the government's opening brief (Pet. Br. 28-38) is irrelevant. But, as the only two courts of appeals that have considered the pertinent legislative history of the Clean Water Act have concluded (*Weyerhaeuser Co. v. Costle*, *supra*, 590 F. 2d at 1036-1037; *American Iron & Steel Institute v. EPA*, *supra*, 526 F. 2d at 1051-1052),<sup>8</sup> Congress unequivocally stated its view that EPA need not consider each discharger's economic circumstances and that a discharger that could not afford to comply with the 1977 limitations would be forced to go out of business:

The Conferees intend that the Administrator \* \* \* will make the determination of the economic impact of [1977] effluent limitations on the basis of classes and categories of point sources, as distinguished from a plant-by-plant determination.

\* \* \* \* \*

Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. [S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 121, 126 (1972), reprinted in *1 A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d

<sup>8</sup> The court below did not cite to any legislative history in either decision or in its earlier decision in *Appalachian Power Co. v. Train*, *supra*.

Cong., 1st Sess. 304, 309 (Comm. Print 1973) (hereinafter "Leg. Hist.")]

The Conferees agreed upon [the language in Section 304(b)(1)(B)] \* \* \* to avoid imposing on the Administrator any requirement \* \* \* to determine the economic impact of controls on any individual plant in a single community.

\* \* \* \* \*

The Conferees intend that the [cost] factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class \* \* \* [e]xcept as provided for in section 301(c) of the Act [1 Leg. Hist. 170, 172 (remarks of Sen. Muskie, primary sponsor of the Act) (quoted with approval in *E.I. duPont de Nemours & Co. v. Train*, *supra*, 430 U.S. at 130).]

Thus, a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, it should be avoided [1 Leg. Hist. 225 (remarks of Rep. Dingell, a sponsor of the Act).]

See generally Pet. Br. 28-38 (detailing Congress' understanding that the 1977 effluent limitations would force marginal operations out of business and that, rather than permit economic variances regarding the 1977 limitations, Congress created an \$800 million revolving loan fund for small businesses).<sup>9</sup>

<sup>9</sup>Respondents' attempts (Resp. Br. 33-34) to explain this overwhelming legislative history are disingenuous. Respondents state that the legislative history cited above suggests only that the 1977 limitations not be waived or modified for economic reasons, and that

Nonetheless, and relying almost exclusively on post-enactment legislative history (Resp. Br. 20, 27-32), respondents further contend that the legislative history of the Act supports the decision below.<sup>10</sup> But, as this Court has

what is at issue here is a resetting of the 1977 limitations (*ibid.*). That semantic distinction is illusory. Equally unavailing is respondents' suggestion (Resp. Br. 34) that the decision of the court below would not require a case-by-case determination of the economic circumstances because the discharger and not EPA has the burden of proof in a variance proceeding. The legislative history quoted above and in our opening brief makes clear that the 1977 limitations were not to be modified for affordability reasons, regardless of the burden of proof.

<sup>10</sup>Respondents quote only two items of contemporaneous legislative history. They cite (Resp. Br. 19) a statement from Rep. Jones, a sponsor of the bill, regarding the definition of "total cost." This statement merely observes that in setting the 1977 limitations, EPA must consider "potential unemployment, dislocation, and rural area economic development sustained by the community, area, or region" (1 Leg. Hist. 231). Rep. Jones did not suggest that EPA need reconsider these costs on a plant-by-plant basis. Rather, he explained that all dischargers were required to meet the 1977 limitations or, if they could not afford to comply, to "go out of business" (*ibid.*). Rep. Jones further observed that economic variances were available only with regard to the 1987 limitations and that even under Section 301(c), the variance level had to "represent an upgrading over the July 1, 1977, requirements of 'best practicable control technology'" (1 Leg. Hist. 232).

Respondents also rely (Resp. Br. 35) on a statement in S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971). That Report, which accompanied a predecessor version of the Clean Water Act, states that the Administrator was expected to "define a range of discharge levels, above a certain base level applicable to all plants within that category." S. Rep. No. 92-414, *supra*, at 50, reprinted in 2 Leg. Hist. 1468. The Report also observes that in applying this range of discharge levels to a discharger, "the factors cited above should be applied to that specific plant" (*ibid.*). The Report does not, suggest however, that EPA must consider the ability of an individual discharger to afford compliance. To the contrary, it further states that "[i]n no case, however, should any plant be allowed to discharge more pollutants per unit of production than is defined by that base level" (*ibid.*). In any event, the Senate Conference Report that accompanied the enacted version of the Clean Water Act makes clear that no variances from the 1977 limitations may be based on a discharger's inability to afford compliance. See page 7, *supra*; 1 Leg. Hist. 304, 309.



repeatedly warned, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980), slip op. 15; *Andrus v. Shell Oil Co.*, No. 78-1815 (June 2, 1980), slip op. 9 n.8. That principle is particularly applicable here.

Thus, respondents claim (Resp. Br. 28-30) that Congress was aware of and approved the Fourth Circuit's prior decision in *Appalachian Power Co. v. Costle*, *supra*. Respondents do not cite to any statement by any congressman expressly approving or even referring to that decision, however. Rather, respondents argue that Congress acquiesced in the *Appalachian Power Co.* decision because it allegedly knew about the decision and did not explicitly reject it. Such post-enactment legislative silence is simply too ephemeral a basis for construing the Act, particularly in light of the language and legislative history of the Act canvassed above and in our opening brief. See *Harrison v. PPG Industries, Inc.*, No. 78-1918 (May 27, 1980), slip op. 13; *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, *supra*, slip op. 9 n.8; *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979).<sup>11</sup>

Moreover, it is far from clear that Congress was in any meaningful sense aware of the *Appalachian Power Co.* decision at all, much less that it approved that portion of the case concerning economic variances. Respondents ask (Resp. Br. 29-30) this Court to conclude that Congress focussed on the *Appalachian Power Co.* case merely because one congressman referred to a 126-page 1977 Library of

<sup>11</sup> It is equally reasonable to suppose that Congress silently approved the standard variance provision that had been promulgated by EPA and that was then in effect as to all industries not affected by the *Appalachian Power Co.* decision.

Congress report summarizing 144 reported Clean Water Act decisions, including *Appalachian Power Co.*<sup>12</sup> See *Case Law Under the Federal Water Pollution Control Act Amendments of 1972*, 95th Cong., 1st Sess. (Comm. Print 1977); 3 *A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act*, 95th Cong., 2d Sess. 374 (1978). The only other evidence cited by respondents (Resp. Br. 28 n.27) regarding Congress' purported awareness of the *Appalachian Power Co.* decision is a letter sent by their lawyers to Sen. Muskie in 1977 concerning a proposed jurisdictional change in the Act. But that letter only mentions the *Appalachian Power Co.* litigation as an example of the kinds of jurisdictional problems that might arise with regard to the proposed legislation and does not mention the variance question posed by this case. See *Federal Water Pollution Control Act Amendments of 1977: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess. Pt. 9, at 17 (1977).

Finally, respondents' claim that "the 1977 Amendments evince a congressional intent to render the Act's effluent limitations more flexible" does not aid their cause. To be sure, Congress in 1977 did modify some of the requirements of the Act. But, as we detailed in our opening brief (Pet Br. 40-42), Congress expressly declined to amend the Act to

<sup>12</sup> The congressman did not discuss *Appalachian Power Co.* or otherwise evidence any knowledge about that particular case.



permit the kind of hardship variance sought by respondents here. Thus, insofar as the 1977 legislative history is relevant, it confirms the correctness of EPA's position.<sup>13</sup>

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.  
*Solicitor General*

SEPTEMBER 1980

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<sup>13</sup> Respondents also cite (Resp. Br. 20) an isolated statement of a congressman made in a 1974 oversight hearing. *Implementation of the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Investigations and Review of the House Comm. on Public Works*, 93d Cong., 2d Sess. 490 (1974). That post-adoptive statement is entitled to little weight. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203-204 n.24 (1976); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, *supra*, slip op. 15-16 & n.13; *Southeastern Community College v. Davis*, *supra*, 442 U.S. at 411 n.11.

**END OF CASE**